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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1964

No. 843

PAUL V. CASE, PETITIONER

vs.

NEBRASKA

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF NEBRASKA

PETITION FOR CERTIORARI FILED JULY 11, 1964
CERTIORARI GRANTED JANUARY 18, 1965

Supreme Court of the United States

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No. 843

PAUL V. CASE, PETITIONER

vs.

NEBRASKA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

INDEX

	Original	Print
Record from the District Court of the Third Judicial District of Nebraska, in and for Lancaster County		
In forma pauperis statement and motion for counsel	1	1
Petition for writ of habeas corpus	2	2
Statement of cause	3	3
Statement of facts	4	4
Points of authority	5	5
Argument	6	6
Certification	7	8

	Original	Print
Record from the District Court of the Third Judicial District of Nebraska, in and for Lancaster County—Continued		
Appendix "A"—Information	8	9
—Journal entry, April 18, 1963—Information for Burglary	9	10
—Journal entry, May 2, 1963—Information for Burglary	9	10
Appendix "B"—Commitment	10	11
Appendix "C"—Certification by Clerk of District Court	11	13
Appendix "D"—Praecipe	11	14
—Notice of Hearing	12	14
Journal entry of order overruling appointment of counsel and order denying petition for writ of habeas corpus	13	16
Notice of appeal to the Supreme Court of the State of Nebraska	15	17
Clerk's certificates	16	17
Proceedings in the Supreme Court of the State of Nebraska	19	19
Motion for appointment of counsel	19	19
Order denying motion for appointment of counsel	21	20
Opinion, Brower, J.	22	20
Judgment	36	30
Clerk's certificate (omitted in printing)	37	30
Order granting motion for leave to proceed in forma pauperis and granting petition for writ of certiorari	38	31

[fol. 1]

PLEAS: In the District Court, Third Judicial District of Nebraska in and for the county of Lancaster, at the January 1963 term of said court, begun and held in the city of Lincoln in said county and state on the 21st day of January, 1963 and on a day therein to-wit: On the 12th day of September, 1963 (that being the 164th Judicial Day of the January 1963 term of said court) Present: Honorable Herbert A. Ronin, Judge Presiding, Merle C. Karnopp, Sheriff and W. F. Sanders, Clerk.

* * * *

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF NEBRASKA, IN AND FOR LANCASTER COUNTY

Criminal Case 18-119

* * * *

PAUL VERNON CASE

vs.

THE STATE OF NEBRASKA

INFORMA PAUPERIS

Petitioner is a Pauper Citizen of these United States, and is without monies, funds, goods or property of any kind to defray costs of filing, docketing, or prosecution to conclude this motion.

* * * *

MOTION FOR COUNSEL

Comes now the Petitioner, Paul Vernon Case, and upon his oath, states that he is a Pauper Citizen of these United States and, therefore, unable to employ counsel to protect

his interest in the above entitled cause. Petitioner now asks this Court to appoint counsel to act in his behalf.

PAUL V. CASE
PAUL VERNON CASE, Petitioner

[Duly sworn to by Paul Vernon Case jurat omitted in printing (all in italics)]

[fol. 2]

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF NEBRASKA, IN AND FOR LANCASTER COUNTY.

18-119

Docket 17; Page 170; Criminal Case

[File Endorsement Omitted]

THE STATE OF NEBRASKA)
Lancaster County) ss.
)

PAUL VERNON CASE

vs.

THE STATE OF NEBRASKA

PETITION FOR WRIT OF HABEAS CORPUS—filed September 9, 1963

Jurisdiction

Comes now the Petitioner, Paul Vernon CASE, and upon his oath, states that he is a native-born citizen of the United States being born in Marion, Ohio on July 22, 1924. That he is now and at this time, confined in the Nebraska Penal and Correctional Complex at Lincoln, Ne-

braska. Petitioner, Paul Vernon CASE further states that he is entitled to all privileges and sanctions guaranteed by the U.S. Constitution of the Nebraska State Constitution. Said Petitioner further states that a certain dociment, entitled "Commitment" is depriving him of his liberty; said document being obtained through fraudulent means by the authorities of Lancaster County, Nebraska, on or about the third day of May, 1963 A.D. This Court, therefore, has jurisdiction, Petitioner prays the Court will, therefore, grant Writ of Habeas Corpus and free him from bondage.

PAUL V. CASE
PAUL VERNON CASE, Petitioner

[*Duly sworn to by Paul Vernon Case jurat omitted in printing (all in italics)*]

[fol. 3]

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF NEBRASKA, IN AND FOR LANCASTER COUNTY

* * * *

PAUL VERNON CASE

vs.

THE STATE OF NEBRASKA

STATEMENT OF CAUSE

Petitioner, Paul Vernon CASE, was sentenced to five (5) years in the Nebraska Penal and Correctional Complex on May 3, 1963, A.D.

Petitioner was "fast talked" and forcibly coerced into waiving his rights (U.S. Constitutional Rights) to have advice and counsel; to have a Preliminary Hearing, and to plead not-guilty.

Mr. William D. Blue told Petitioner he, Petitioner, would be charged with being "An Habitual Criminal" if

he did not waive these rights. He, Petitioner was held in Solitary Confinement in City Jail, until such time as he would agree-under cruel and unusual circumstances.

The basic rights waived by this Petitioner are guaranteed him under the Sixth Amendment of the U.S. Constitution and are so fundamental and essential to a fair trial that they are made obligatory upon the States, *All* states, by way of the Fourteenth Amendment. For reference see Gideon vs. Wainwright in the U.S. Supreme Court. October 1962, Term, No. 155; all Justices concurring.

PAUL V. CASE
PAUL V. CASE, Petitioner

[*Duly sworn to by Paul Vernon Case jurat omitted in printing (all in italics)*]

[fol. 4]

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF NEBRASKA, IN AND FOR LANCASTER COUNTY

* * * *

PAUL VERNON CASE

vs.

THE STATE OF NEBRASKA

STATEMENT OF FACTS

Petitioner was stopped by police in a prowl car while he, Petitioner, was walking on the street near Brian Memorial Hospital. His identification was "radioed" in to Police Headquarters-even though Petitioner had no weapon or article of suspicion on his person. Police Headquarters notified prowl car to "hold him-he's on parole."

Petitioner was lodged in city jail in solitary confinement, with no bedding, no sanitation or toilet articles—

the heat was turned on full, two unedible meals per day —and no contact with counsel. Petitioner was "herded" into police line-up at least thirty (30) times in four (4) days.

Petitioner was "booked" on an open charge—which is illegal, at about 1:00 o'clock a.m., Monday, April 15, 1963. He was held incommunicado until noon of April 18, 1963—at which time he was taken before William D. Blue, Chief Deputy Prosecutor, and threatened with the "habitual Criminal Act" if he did not plead guilty; waive his right to counsel, and waive his right to preliminary hearing.

Waiving his Constitutional Rights, under these circumstances, is a violation—not to be tolerated, as petitioner will prove in "Points of Authority" and "Arguments" which follow immediately.

PAUL V. CASE
PAUL VERNON CASE, Petitioner

[*Duly sworn to by Paul Vernon Case jurat omitted in printing (all in italics)*]

[fol. 5]

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF NEBRASKA, IN AND FOR LANCASTER COUNTY.

* * * *

PAUL VERNON CASE

vs.

THE STATE OF NEBRASKA

POINTS OF AUTHORITY

This is a simple case and, therefore, needs but some little (one) authority to govern—that of Gideon vs. Wainwright; U.S. Supreme Court, October Term, 1962, No. 155.

It must first be realized that when the U.S. Supreme Court decided Gideon vs. Wainwright, Supra., they first

had to reconsider Betts vs. Brady, 316, U.S. 455. In so doing, the Court reversed Betts vs. Brady in order to reverse Gideon vs. Wainwright.

This Petitioner's case is identical to Gideon's even to the crime and sentence imposed.

When the U.S. Supreme Court reversed Gideon vs. Wainwright, Supra., they made the Sixth Amendment, U.S. Constitution, binding on the States—all of the States—by reason of the Due Process Clause of the Fourteenth Amendment.

PAUL V. CASE
PAUL V. CASE, Petitioner

[*Duly sworn to by Paul Vernon Case jurat omitted in printing (all in italics)*]

[fol. 6] ARGUMENT

This Petitioner has a case which is parallel to Gideon vs. Wainwright, U.S. Supreme Court, October Term, 1962, No. 155. He appeared before the Honorable Herbert A. Ronin in District Court, on two (2) occasions. First for arraignment—I think—and secondly was definitely for sentence. He received five (5) years. *At no time* was counsel present in the Court for the benefit of the defendant—or to advise him of his rights.

It is realized that the State may first contend that the Petitioner waived his rights. From Gideon vs. Wainwright, supra, " * * * unless these rights are competently and intelligently waived". And also, "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes, no skill in the science of law. If charged with crime, he is incapable, generally of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without aid of counsel, he may be put on trial without a proper charge, and convicted on improper evidence—or evidence irrelevant to the

issue, or otherwise inadmissable. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he doesn't know how to establish his innocence."

It may be argued, secondly, by the State that counsel is mandatory, only in capital cases. From Gideon vs. Wainwright, supra, the accenting opinion of Mr. Justice Clark: "* * * I must conclude here, as in Kinseller vs. United States ex rel. Singleton, 361 US 234, that the Constitution makes no distinction between capital and non-capital cases. The Fourteenth Amendment requires due process of law for the deprival of "liberty" just as for deprival of "life", and there cannot Constitutionally be a difference in the sanction involved. How can the Fourteenth Amendment tolerate a procedure which it condemns in capital cases on the ground that deprival of liberty is less onerous than deprived of life—a value judgment not universally accepted—or that only the lat-
[fol. 7] ter deprival is irrevocable? I can find no acceptable rationalization for such a result, and I, therefore, concur in the judgment of the Court." Justice Clark concurring

Thirdly, and finally, the State may argue that laws of the State of Nebraska, and of the Nebraska Constitution, do not require an attorney to be appointed. Petitioner can only refer the Court to the entire text of Gideon vs. Wainwright, supra. It is devoted specifically to the task of dispelling any lingering doubts as to whether the Fourteenth Amendment makes the Sixth Amendment binding on the States—*all* States—and, therefore, fundamental in nature.

In conclusion the Petitioner would like to point out that the wrong against him was instigated and executed by the Prosecution in the person of one William D. Blue, Chief Deputy. The only way this Petitioner could "competently and intelligently waive his rights", would be if he was a qualified attorney, licensed to practice law in the State of Nebraska. He most assuredly is not! Mr. William D.

Blue, with malice aforethought, did willfully, forcefully, and feloniously coerce and harrass this Petitioner into waiving his fundamental Constitutional Rights—contrary to the laws and guarantees of the U.S. Constitution as set forth in the Sixth Amendment and made forcing on the State of Nebraska by the Fourteenth Amendment.

Petitioner should not have to take his plea higher than this Court, as this Court has full authority to rectify this wrong by reason of Gideon vs. Wainwright, supra; and that it governs. Judgment against Petitioner should be reversed.

PAUL V. CASE
PAUL VERNON CASE, Petitioner

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF NEBRASKA, IN AND FOR LANCASTER COUNTY.

* * * *

CERTIFICATION

I, R. E. Ranard, a Notary Public in and for the County of Lancaster, Nebraska, hereby certify that all documents contained in the appendix annexed hereto are correct and true copies of copies issued by the Clerk of the District [fol. 8] Court for the County of Lancaster, Nebraska.

In testimony whereof, I have this day set my hand and affixed my seal, on the 5th day of September, A.D., 1963.

[SEAL]

R. E. RANARD
R. E. RANARD, Notary Public

My Commission expires *7-13-68*

APPENDIX "A"

VERBATIM COPY OF "INFORMATION".

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF NEBRASKA, IN AND FOR LANCASTER COUNTY.

THE STATE OF NEBRASKA)
Lancaster County) ss.
)

INFORMATION

THE STATE OF NEBRASKA

vs.

PAUL CASE

BE IT REMEMBERED, That *William D. Blue, Chief Deputy*, County Attorney in and for Lancaster County, and in the Third Judicial District of the State of Nebraska, who prosecutes in the name and by authority of the State of Nebraska, comes here in person into Court at this, the *January* Term, A.D. 1963, thereof, and for the State of Nebraska, gives the Court to understand and be informed that Paul Case late of the County aforesaid, on or about the *14* day of *April*, A.D., 1963 in the County of Lancaster, and the State, aforesaid, then and there being, did

> unlawfully, wilfully, maliciously, feloniously and forcibly break and enter into a certain dwelling house numbered 3800 Stockwell Street in the city of Lincoln, County of Lancaster, Nebraska which said dwelling house is owned and occupied by Wayne D. Kingery, with the intent of the said Paul Case then and there to steal property of value contained in said dwelling house,

contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the State of Nebraska.

/s/ William D. Blue
Chief Deputy County
Attorney

[fol. 9]

VERBATIM COPY OF "JOURNAL ENTRY

JOURNAL ENTRY

That on the 18th day of April, 1963 (that being the 63rd Judicial Day of the January 1963 term of said court) were had and done the following proceedings as appear upon Court Journal "286" at page 73, Honorable Herbert A. Ronin, Judge to-wit:

17-170 Information for Burglary

THE STATE OF NEBRASKA

vs.

PAUL CASE

Now on this day comes the Deputy County Attorney, William D. Blue, on behalf of the State of Nebraska and defendant appears in court and after waiving his constitutional rights, said defendant standing at the bar of this court in open court is duly arraigned on the information filed against him herein, and said information having been read to him, he is duly inquired of by the Court whether he is guilty or not guilty of the offense charged against him in said information, and the defendant for his answer thereto says he is "Guilty". The Court accepts said plea and finds the defendant guilty as charged.

Custody of defendant is remanded to the Sheriff of Lancaster County, Nebraska and sentence is deferred pending a pre-sentence investigation of the case by the Adult Probation Officer of the Court.

JOURNAL ENTRY

That on the 2nd day of May, 1963 (that being the 72nd Judicial Day of the January 1963 term of said court) were had and done the following proceedings as appear

upon Court Journal "286" at page 131, Honorable Herbert A. Ronin, Judge to-wit:

17-170 Information for Burglary

THE STATE OF NEBRASKA

vs.

PAUL CASE

Now on this day comes the County Attorney on behalf of the State of Nebraska and the defendant being present in Court, this cause comes on for sentencing.

The defendant had nothing to say prior to sentencing.

It is therefore considered, ordered and adjudged by the Court that the said defendant, Paul Case, is guilty as he stands charged in the information filed herein and that he be imprisoned and confined in the Nebraska Penal and Correctional Complex in Lancaster County, Nebraska for [fol. 10] a period of five (5) years from this date until released according to law, and pay the costs of this prosecution taxes at $——.

It is further considered, ordered and adjudged by the Court that said sentence is to run consecutively to the present term now being served by the defendant.

APPENDIX "B"

VERBATIM COPY OF "COMMITMENT."

THE STATE OF NEBRASKA)
Lancaster County) ss.
)

The State of Nebraska To the Sheriff of Said County:

WHEREAS, At the regular term of the District Court for said County, which term was begun and held at the Court Rooms, in Lincoln, in said County, on the *21st* day of *January* 196*3*. Present, the *Hon Herbert A. Ronin, Elmer M. Scheele, John L. Polk and Bartlett E. Boyles,*

Judges, AND WHEREAS, the County Attorney in and for said County, on the *18th* day of *April* 196*3*, came into Court and presented a certain information in due form of law, against *Paul CASE* for *BURGLARY* which information was by order of the Court filed and the cause docketed; and afterwards, on the *18th* day of *April* 196*3*, further proceeding were had upon said information, to-wit: The said defendant *PAUL CASE* was duly arraigned and entered *his* plea of guilty to the charge contained in the information.

AND WHEREAS, on the *2nd* day of *May*, 196*3*, the said defendant was duly arraigned before the Court for sentence, and was then by the *Hon. Herbert A. Ronin*, Judge sentenced in these words:

> "It is therefore considered, ordered and adjudged by the Court that the said defendant, Paul Case, is guilty as he stands charged in the information filed herein and that he be imprisoned and confined in the Nebraska Penal and Correctional Complex in Lancaster County, Nebraska for a period of five (5) years from this date until released according to law, and pay the costs of this prosecution taxed at *$35.00*.
>
> [fol. 11] It is further considered, ordered and adjudged by the Court that said sentence is to run consecutively to the present term now being served by the defendant."

You are therefore commanded to proceed to execute the said sentence and order of the Court.

WITNESS my hand and seal of said Court, at Lincoln, this *2nd* day of *May* 196*3*.

W. F. SANDERS, Clerk
By /s/ Dorothy T. Metcalf, Deputy

APPENDIX "C"

VERBATIM COPY OF "CERTIFICATION BY CLERK OF DISTRICT COURT:

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA.

STATE OF NEBRASKA,)
COUNTY OF LANCASTER) ss.
)

* * * *

I, W. F. SANDERS, Clerk District Court, Third Judicial District of Nebraska within and for the County of Lancaster, do hereby certify that the above and foregoing *are* true and complete copies of

INFORMATION—and COMMITMENT, with all endorsements thereon and ARRAIGNMENT, ETC—SENTENCE—entered in a cause in said court wherein THE STATE OF NEBRASKA is plaintiff and PAUL CASE is defendant,

as the same appears fully upon the records and files of said court and now in my charge remaining as Clerk aforesaid.

WITNESS my hand and the seal of said court at Lincoln, Nebraska, this *27th* day of *August*, 1963.

s/s W. F. Sanders,
Clerk District Court

By s/s Otis F. Nelson
Deputy

APPENDIX "D"

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF NEBRASKA, IN AND FOR LANCASTER COUNTY.

Docket 17; Page 170 Criminal Case

THE STATE OF NEBRASKA)
Lancaster County) ss
)

PAUL VERNON CASE

vs.

THE STATE OF NEBRASKA

[fol. 12] PRAECIPE

TO: The Assignment Clerk of Said Court:

Sir: You will please place this Motion, together with the attached papers, upon the Docket at/of the Court for hearing before the Honorable Herbert A. Ronin, Judge of said Court, in his Court Room at nine-thirty o'clock in the forenoon of September 16, 1963, A.D., or as soon thereafter as Counsel may be heard.

* * * *

NOTICE OF HEARING

TO: Paul Douglas, Prosecuting Attorney for Lancaster County:

Sir: You will please take notice, that on this date, I have filed Motion, together with the attached papers, with the Clerk of said Court for hearing in accordance with the terms of the Praecipe attached hereto. This cause, on this question, has not heretofore been brought

before this Court, and is now ready for hearing.

PAUL V. CASE
PAUL VERNON CASE, Petitioner
Acting in Proper Person
Box 111
Lincoln, Nebraska

State of Nebraska)
County of Lancaster)

On this the 5 day of September, 1963, before, R. E. Ranard, the undersigned officer, personally appeared Paul Vernon CASE, known to me to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same for the purpose therein contained.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

R. E. RANARD
R. E. RANARD,
Notary Public

[SEAL]

My Commission expires 7-13-68.

Clerk's Office, District Court, Lancaster County, Nebraska —Filed Sep 9, 1963—W. F. Sanders, Clerk District Court.

[fol. 13]

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF NEBRASKA, IN AND FOR LANCASTER COUNTY

PAUL VERNON CASE

vs.

THE STATE OF NEBRASKA

JOURNAL ENTRY OF ORDER OVERRULING APPOINTMENT OF COUNSEL AND ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS—September 12, 1963

* * * * *

On poverty affidavit filed herein, it is by the Court ordered that the petitioner herein be and hereby is allowed to file a petition in forma pauperis.

Motion of the petitioner for the appointment of counsel is overruled.

This cause now comes on to be heard on the petition for a Writ of Habeas Corpus, and is submitted to the Court, on due consideration whereof the Court finds that the petition does not state facts sufficient to require the issuance of the Writ of Habeas Corpus asked by the petitioner and does not state a cause of action for the issuance of the Writ.

It is therefore considered, ordered and adjudged by the Court that the petition of the petitioner be and the same hereby is denied and the petition herein be and hereby is dismissed.

* * * *

[fol. 14] * * *

[fol. 15]

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF NEBRASKA, IN AND FOR LANCASTER COUNTY

MAIL
Sep 19 1963
#1

NOTICE OF APPEAL—filed September 20, 1963

September 18, 1963

Paul V. Case, 23049
Box 111
Lincoln, Nebraska

Wilford F. Sanders,
Clerk of the District Court
Lincoln, Nebraska

Re: 18-119

(Paul V. Case, vs. State of Nebraska)

Dear Mr. Sanders:

Would you kindly forward the petition for Writ of Habeas Corpus in the above named case 18-119 to the Clerk of the Nebraska State Supreme Court?

This above action is desired so that an appeal before the State Supreme Court can be made and this action brought a *conclusion.*

Very truly Yours,

Paul V. Case, 23049

[File Endorsement Omitted]

[fol. 16]

[Clerk's Certificate to foregoing paper and transcript omitted in printing]

[fol. 17]

35637

18-119

CASE

v.

STATE.

Certified Copy of Notice of Appeal

SUPREME COURT OF NEBRASKA
FILED
Sep 23 1963
GEORGE H. TURNER,
Clerk

[fol. 18] * * *

[fol. 19]

IN THE SUPREME COURT OF THE STATE OF NEBRASKA

35637

PAUL V. CASE, 23049

vs.

STATE OF NEBRASKA

MOTION FOR APPOINTMENT OF COUNSEL—filed December 23, 1963

Comes now the Petitioner, Paul V. Case, and respectfully requests that counsel be appointed to represent his interests in the above numbered cause.

This Petitioners cause becomes more and more complicated by the day—due to the new decisions handed out by the United States Supreme Court and the many things Petitioner is learning from other sources.

All this material is useless to the Petitioner without the advice of counsel because of Petitioners state of confinement and the regulations imposed.

This Petitioner, on this cause, has never had the benefit of counsel. Due the far reaching possibilities of the outcome of this case it would seem that counsel is a prerequisite.

/s/ Paul V. Case, 23049

[fol. 20]

[File Endorsement Omitted]

[fol. 21]

IN THE SUPREME COURT OF THE STATE OF NEBRASKA

* * * *

No. 35637.

PAUL V. CASE, APPELLANT

v.

STATE OF NEBRASKA, APPELLEE

ORDER DENYING MOTION FOR APPOINTMENT OF COUNSEL—January 3, 1964

This cause coming on to be heard upon motion of appellant for appointment of counsel was submitted to the court; upon due consideration whereof, it is by the court ordered that said motion be, and it hereby is, denied.

[fol. 22]

IN THE SUPREME COURT OF THE STATE OF NEBRASKA

35637

CASE

v.

STATE

1. A provision of the Bill of Rights of the Constitution of the United States which is fundamental and essential to a fair trial is made obligatory upon the states by the Fourteenth Amendment; the Sixth Amendment's guaranty of counsel is one of these fundamental rights.

2. The due process clause of the Fourteenth Amendment to the Constitution of the United States guarantees the assistance of counsel, unless that right is intelligently and understandingly waived by the accused.

3. Courts must indulge every reasonable presumption against a waiver of fundamental constitutional rights, and do not presume acquiescence in their loss.

4. Where the constitutional infirmity of a state criminal trial without counsel is manifested, and there is no allegation or showing of affirmative waiver of counsel, a resulting conviction is unconstitutional and the accused is entitled to relief therefrom.

5. A plea of guilty must be freely and understandingly made by one competent to know the consequences thereof.

6. The sufficiency of the statements of the petition of relator to justify a writ of habeas corpus allowed by virtue thereof may be tested before making return thereto by a motion to quash the writ.

[fol. 23] 7. The remedy of habeas corpus is not demandable of course, but legal cause must be shown to entitle a petitioner to the benefit of it.

8. Habeas corpus is not available to discharge a prisoner from a sentence of penal servitude if the court imposing it had jurisdiction of the offense and of the person charged with the crime, and the sentence was within the power of the court.

9. It is for the Supreme Court of this state to decide what issues are justiciable in an application for a writ of habeas corpus made to the courts of this state.

10. The Supreme Court of this state has the undoubted right to decide upon its own jurisdiction and the jurisdiction of the courts of this state to which its appellate power extends.

11. Habeas corpus cannot be used as a substitute for a writ of error.

12. Habeas corpus is a collateral and not a direct proceeding when regarded as a means of attack upon a judgment sentencing a defendant.

13. When the judgment is regular upon its face and was given in an action where the court had jurisdiction [fol. 24] of the offense and of the person of the defendant, extrinsic evidence is not admissible to show its invalidity.

14. The existence of a right is one matter, the availability of a particular remedy in which that right may be asserted is distinctly a separate matter.

[fol. 25] Heard before White, C.J., Carter, Messmore, Yeager, Spencer, Boslaugh, and Brower, JJ.

OPINION—filed June 19, 1964

BROWER, J.

Paul Vernon Case, hereinafter referred to as the petitioner, instituted this habeas corpus action in the district court for Lancaster County, Nebraska, on September 9, 1963. At the time of filing his petition he was confined in the Nebraska Penal and Correctional Complex at Lincoln, Nebraska, hereafter referred to as the complex. The object of the petition is to have a writ of habeas corpus to determine whether he is being unlawfully confined therein.

On September 12, 1963, the district court found that the petition failed to state a cause of action requiring the issuance of the writ, denied the relief requested, and dismissed the petition. From this order the petitioner has perfected an appeal to this court.

The petition alleged he was held incommunicado in solitary confinement in an overheated portion of the city jail for 3 days without proper food or bedding; was repeatedly "herded" into a police lineup; and at the end of such time was "fast talked" and coerced by the chief deputy prosecutor to waive his constitutional rights to preliminary hearing and counsel and to plead guilty under threat of prosecution under the habitual criminal act.

The petition had attached thereto certified copies of the information filed against the petitioner on April 18, 1963, in the district court for Lancaster County, charging him with the crime of burglary. Certified copies of [fol. 26] journals of the court were likewise appended. The first showed that he appeared in court on April 18, 1963, and "after waiving his constitutional rights," he was "duly arraigned on the information filed against him . . . and said information having been read to him," he pleaded "Guilty." The plea was accepted by the court and he was found guilty as charged. His custody was remanded to the sheriff and sentence was deferred pending a presentence investigation. The second journal entry shows petitioner was brought into court on May 2, 1963, and having nothing to say prior to his being sentenced, the judgment of the court was that he be confined in the Nebraska Penal and Correctional Complex for 5 years,

said sentence to run consecutively with the present term being served by him. A certified copy of the commitment to the complex was attached.

Petitioner assigns error to the trial court: In failing to assign counsel to advise petitioner as to his state and federal constitutional rights; in allowing petitioner to waive his rights under the Sixth Amendment to the Constitution of the United States made binding upon the states by the due process clause of the Fourteenth Amendment thereto; and in allowing him to enter a plea of guilty without benefit of counsel. In his brief he admits waiving in the trial court his constitutional rights to preliminary hearing and counsel and entering a plea of guilty but again alleges his acts in that respect were coerced as alleged in his petition.

The petitioner relies on recent decisions of the United States Supreme Court and he particularly cites Gideon v. Wainwright, 372 U. S. 335, 83 S. Ct. 792, 9 L. Ed. 2d [fol. 27] 799, 92 A. L. R. 2d 733, which overruled Betts v. Brady, 316 U. S. 455, 62 S. Ct. 1252, 86 L. Ed. 1595. The Betts case was an appeal from the decision of the Court of Appeals of Maryland in an original habeas corpus proceeding instituted in that court after Betts' conviction and while serving his sentence. The writ was issued; a hearing was had; his contention was rejected; and he was remanded to the custody of the prison warden. Betts had been indicted for robbery in the original trial court in Maryland. He told the trial judge that for lack of funds he was unable to hire a lawyer and asked the trial court to appoint counsel for him. The judge informed him that it was not the practice in that county to appoint counsel for indigent defendants except in murder and rape cases. The United States Supreme Court, in a divided opinion after reviewing the law as it existed in the several states at and before the adoption of the federal Constitution, held that the due process clause of the Fourteenth Amendment to the Constitution of the United States does not confer on an indigent person charged with a crime in a state court an absolute right to counsel independent of circumstances, and affirmed the judgment of the Maryland court. The decision turned to some ex-

tent on Betts being a mature person of ordinary intelligence and ability to take care of his own interests on a narrow issue involving the credence to be placed on his claim of an alibi.

The facts in the case of Gideon v. Wainwright, *supra*, may be summarized as follows: In defendant's trial in a Florida state court on a charge of a felony—having broken and entered a poolroom with intent to commit a misdemeanor—the trial court denied defendant's request to appoint counsel for him on the ground that under the [fol. 28] laws of Florida only a defendant charged with a capital offense was entitled to such an appointment. After his conviction defendant filed in the Supreme Court of Florida a petition in habeas corpus. He attacked the conviction on the ground that his federal constitutional rights were violated by the trial court's refusal to appoint counsel. The court, without opinion, denied relief. The Supreme Court of the United States in that case in overruling Betts v. Brady, *supra*, held: A provision of the Bill of Rights of the Constitution of the United States which is fundamental and essential to a fair trial is made obligatory upon the states by the Fourteenth Amendment; the Sixth Amendment's guaranty of counsel is one of these fundamental rights. It held in such a case the refusal of a state trial court to appoint counsel for one prosecuted for a felony violates the Sixth Amendment's guaranty of counsel made obligatory upon the states by the due process clause of the Fourteenth Amendment.

Both before and after Betts v. Brady, *supra*, the Supreme Court of the United States had held that under certain circumstances the due process clause of the Fourteenth Amendment required that counsel be provided a prisoner. It was often applied to those accused of capital offenses. See, Powell v. Alabama, 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158, 84 A. L. R. 527; Avery v. Alabama, 308 U. S. 444, 60 S. Ct. 321, 84 L. Ed. 377; Hamilton v. Alabama, 368 U. S. 52, 82 S. Ct. 157, 7 L. Ed. 2d 114. The same rule was applied to cases which that court held involved "special circumstances" such as where conviction occurred under the influence of mob spirit, Frank v. Mangum, 237 U. S. 309, 35 S. Ct. 582, 59 L. Ed. 969;

[fol. 29] or under alleged community coercion, Moore v. Dempsey, 261 U. S. 86, 43 S. Ct. 265, 67 L. Ed. 543; or where perjured testimony was knowingly used by a state prosecutor, Mooney v. Holohan, 294 U. S. 103, 55 S. Ct. 340, 79 L. Ed. 791, 98 A. L. R. 406. However, it was not until the recent case of Gideon v. Wainwright, *supra*, here considered, that the full impact of the Sixth Amendment was applied through the due process clause of the Fourteenth Amendment to all felony cases.

The present requirements in regard to furnishing counsel to indigent defendants in such cases is set forth by the United States Supreme Court in Carnley v. Cochran, 369 U. S. 506, 82 S. Ct. 884, 8 L. Ed. 2d 70, and may be stated as follows: The due process clause of the Fourteenth Amendment guarantees the assistance of counsel unless that right is intelligently and understandingly waived by the accused. Courts must indulge every reasonable presumption against a waiver of fundamental constitutional rights, and do not presume acquiescence in their loss. Where the constitutional infirmity of a state criminal trial without counsel is manifested, and there is no allegation or showing of affirmative waiver of counsel, a resulting conviction is unconstitutional and the accused is entitled to relief therefrom.

In the opinion the United States Supreme Court said: "However, we recognized in Rice v. Olson (324 U. S. 786, 65 S. Ct. 989, 89 L. Ed. 1367) that, although the Fourteenth Amendment would not countenance any presumption of waiver from the appearance of the accused without counsel and the silence of the record as to a request, the entry of the guilty plea might have raised a fact issue as to whether the accused did not intelligently and [fol. 30] understandingly waive his constitutional right. We held that a hearing was required since the facts were in dispute. In the present case, however, there was no guilty plea, and the return to the writ does not allege an affirmative waiver. Therefore, there is no disputed fact question requiring a hearing. Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and

understandingly rejected the offer. Anything less is not waiver."

In the cause before us, the writ having been denied, there was no trial and no bill of exceptions is before us showing what happened at the time of the petitioner's plea. The journal of the court merely recites the conclusions of the court that petitioner waived his constitutional rights and entered a plea of guilty. It is only through the assertions of the petitioner in his brief that it can be said that he waived counsel and from his allegations this waiver was induced through the coercion alleged in his application for the writ. It is a general rule that a plea of guilty must be freely and understandingly made by one competent to know the consequences thereof. See, 22 C. J. S., Criminal Law, s. 423 (2), p. 1176; Waley v. Johnston, 316 U. S. 101, 62 S. Ct. 964, 86 L. Ed. 1302. Whether the facts in the cause before us would show any such coercion is not before us and in view of our decision could not come before us in this type of action.

The petitioner asks that this judgment be reversed because of the recent opinions of the United States Supreme Court herein discussed, Gideon v. Wainwright, [fol. 31] *supra*, and Carnley v. Cochran, *supra*. This involves a discussion of the office of the writ of habeas corpus in this state and the difference between the jurisdiction of this court and the district courts in this state and the courts of the United States in such an action.

It may here be said that the statutes of this state, section 29-1803, R. S. Supp., 1963, provide for the assignment of counsel to one indicted for an offense which is capital or punishable by imprisonment in the Nebraska Penal and Correctional Complex if the prisoner has not the ability to procure counsel and for the payment of the services of such counsel. The right to counsel in a prosecution involving a felony is clear after indictment under this statute. The right to review the proceedings with respect to the denial of certain rights including the omission or refusal to assign counsel to a prisoner so charged has been denied him in a collateral proceeding of habeas corpus by the decisions of this court hereinafter set out.

Section 29-2801, R. R. S. 1943, provides for the issuance of a writ of habeas corpus on application being made on behlaf of one unlawfully deprived of his or her liberty, "except persons convicted of some crime or offense for which they stand committed, or persons committed for treason or felony, the punishment whereof is capital, plainly and specially expressed in the warrant of commitment, * * *." This provision insofar as it relates to persons who have been convicted of crime appears to be in accord with the common law with respect to habeas corpus. See 25 Am. Jur., Habeas Corpus, s. 26, p. 159. See, also, the annotation appended to In re Appeal of Bion, 59 [fol. 32] Conn. 372, 20 A. 662, in 11 L. R. A. 694, citing early cases including those of the Supreme Court of the United States. The section of the statute has existed in its present form since the General Statutes of 1873, p. 804, and the Legislature has not seen fit to alter it. The reports of this court are replete with its decisions interpreting it. A long list of such cases appears in Jackson v. Olson, 146 Neb. 885, 22 N. W. 2d 124, 165 A. L. R. 982. In Sedlacek v. Hann, 156 Neb. 340, 56 N. W. 2d 138, this court held: "The sufficiency of the statements of the petition of relator to justify a writ of habeas corpus allowed by virtue thereof may be tested before making return thereto by a motion to quash the writ. * * *

"The remedy of habeas corpus is not demandable of course, but legal cause must be shown to entitle a petitioner to the benefit of it. * * *

"Habeas corpus is not available to discharge a prisoner from a sentence of penal servitude if the court imposing it had jurisdiction of the offense and of the person charged with the crime, and the sentence was within the power of the court." See, also, Iron Bear v. Jones, 149 Neb. 651, 32 N. W. 2d 125; In re Application of Carper, 144 Neb. 623, 14 N. W. 2d 225.

In the case of Hawk v. Olson, 145 Neb. 306, 16 N. W. 2d 181, this court affirmed a judgment of the district court in its denial of the issuance of a writ of habeas corpus setting forth substantially the same rules of law as have been hitherto set forth herein. It held that the guilt or innocence of one convicted of crime was not jus-

ticiable in habeas corpus and that such an action is not [fol. 33] recognized by this court as a remedy to review a judgment of conviction for crime. It further held that the facts alleged did not show the petitioner had been denied his right of appeal. In the opinion, however, it was further stated that this court could see nothing in the facts alleged, if true, that in any way prevented the petitioner from having a fair trial. On certiorari in Hawk v. Olson, 326 U. S. 271, 66 S. Ct. 116, 90 L. Ed. 67, the Supreme Court of the United States reversed the judgment and remanded the cause holding that the facts alleged by the petitioner entitled him to a hearing on the claimed violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States because of failure to allow him an opportunity to consult with counsel in the critical period between his arraignment and trial. That court, however, accepted the holding of this court that the sufficiency of the evidence could not be raised by habeas corpus and that the allegations did not show interference with the prisoner's right of appeal. On the cause being remanded the petitioner in the cited case requested the mandate to issue from this court directing the writ of habeas corpus to issue. This court declined to issue the mandate in Hawk v. Olson, 146 Neb. 875, 22 N. W. 2d 136, stating several rules of law already set out herein and further holding: "It is for the Supreme Court of this state to decide what issues are justiciable in an application for a writ of habeas corpus made to the courts of this state.

"The Supreme Court of this state has the undoubted right to decide upon its own jurisdiction and the jurisdiction of the courts of this state to which its appellate power [fol. 34] extends. * * *

"Habeas corpus cannot be used as a substitute for a writ of error.

"Habeas corpus is a collateral and not a direct proceeding when regarded as a means of attack upon a judgment sentencing a defendant. * * *

"When the judgment is regular upon its face and was given in an action where the court had jurisdiction of the offense and of the person of the defendant, extrinsic evi-

dence is not admissible to show its invalidity (in habeas corpus) . * * *

"The existence of a right is one matter, the availability of a particular remedy in which that right may be asserted is distinctly a separate matter."

The petitioner now urges that because of the decisions of the Supreme Court of the United States hitherto discussed, Gideon v. Wainwright, *supra*, together with the rules respecting the appointment of counsel and the requirements as to the waiver of counsel in Carnley v. Cochran, *supra*, and other similar federal cases, the courts of this state should now consider the evidence relating to the sufficiency of the petitioner's waiver of counsel and plea of guilty in a habeas corpus as well as in a direct proceeding in error or by appeal.

The statute, section 29-2801, R. R. S. 1943, authorizing the writ of habeas corpus and the decisions of this court construing the jurisdiction of courts in such cases hitherto discussed remains unchanged. The Legislature has not seen fit by amendment to enlarge the powers of the courts of this state with respect to such writs. Neither should this court do so by judicial legislation. Post-[fol. 35] conviction procedure is properly one for the Legislature to consider. The position of the courts of this state in respect to questions that are justiciable in habeas corpus are quite limited in comparison with those of the courts of the United States which have been granted authority by Congress to issue such a writ to a prisoner when he is in custody in violation of the Constitution, laws, or treaties of the United States, 28 U. S. C. A., s. 2241, although its power is limited in certain cases including those instances set out in 28 U. S. C. A., s. 2254.

We conclude that under the statutes of this state and the decisions of this court, we have no jurisdiction to review the conviction of the petitioner in a habeas corpus proceeding. It follows that the judgment of the trial court must be affirmed.

AFFIRMED.

[fol. 36]

* * * *

IN THE SUPREME COURT OF THE STATE OF NEBRASKA

* * * *

Appeal from the District Court for Lancaster County. No. 35637

PAUL VERNON CASE, APPELLANT

v.

STATE OF NEBRASKA, APPELLEE

JUDGMENT—June 19, 1964

This cause coming on to be heard upon appeal from the district court of Lancaster county was argued by counsel and submitted to the court; upon due consideration whereof, the court finds no error apparent in the record of the proceedings and judgment of said district court. It is, therefore, considered, ordered and adjudged that said judgment of the district court be, and it hereby is, affirmed; that appellee recover of and from appellant its costs herein expended, taxed at $; for all of which execution is hereby awarded, and that a mandate issue accordingly.

Opinion by Brower, Judge.

[fol. 37]

[Clerk's Certificate to foregoing transcript omitted in printing.]

[fol. 38]

SUPREME COURT OF THE UNITED STATES

No. 228 Misc., October Term, 1964

PAUL V. CASE, PETITIONER

vs.

NEBRASKA

On petition for writ of Ceriorari to the Supreme Court of the State of Nebraska.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—January 18, 1965

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby granted. The case is transferred to the appellate docket as No. 843 and placed on the summary calendar.

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PETITION NOT PRINTED

RESPONSE NOT PRINTED

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JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 843

PAUL V. CASÉ,

Petitioner,

vs.

STATE OF NEBRASKA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

BRIEF FOR THE PETITIONER

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INDEX

SUBJECT INDEX

BRIEF FOR THE PETITIONER

	Page
Opinion Below	1
Jurisdiction	1
Statutes Involved	2
Questions Presented	2
Statement	2
Summary of Argument	6
Argument	10
I. Petitioner's Allegations Show a Violation of the Constitution in That He Was Tried and Convicted Without the Assistance of Counsel After Being Coerced to Waive Counsel and Plead Guilty	10
II. The Nebraska Judgment Must Be Set Aside and the Case Remanded Because the State, by Refusing to Hear Petitioner's Claim, Has Breached Its Constitutional Obligation to Provide a Remedy for a Person Deprived of His Liberty in Violation of the Federal Constitution	12
A. Nebraska Provides No Corrective Process for Determining the Constitutionality of Petitioner's Imprisonment	12
1. Habeas Corpus Unavailable	12
2. Coram Nobis Unavailable	15
3. No Other Remedies Presently Available	18
B. A State Is Constitutionally Required to Provide Corrective Process for Its Convicted Prisoners	20

Page

C. This Court Should Enforce the State's Constitutional Obligation to Furnish Corrective Process for Unconstitutional Imprisonment—the Appropriate Mandate .. 28

1. Reasons Why the State's Obligation Should Be Enforced 30

2. The Appropriate Mandate 38

III. Since Nebraska Allows Habeas Corpus to Attack Convictions for Jurisdictional Defects Based on Nebraska Law, the Court Below Has Unconstitutionally Discriminated Against Federal Law by Refusing Habeas Corpus for Jurisdictional Defects Based on the Fourteenth Amendment 42

Conclusion 46

Appendices

A. Nebraska Statutes 47

B. Hawk's Quest for a Remedy 50

C. The Illinois Merry-Go-Round 52

D. Uniform Post-Conviction Procedure Act 54

Citations

CASES:

Boles v. *Stevenson*, 379 U.S. 43 ..... 29, 41
Carlsen v. *State*, 129 Neb. 84, 261 N.W. 339 ..... 15, 16
Carnley v. *Cochran*, 369 U.S. 506 5
Carter v. *Illinois*, 329 U.S. 173 39
Case v. *Nebraska*, 177 Neb. 774, 131 N.W.2d 191 3
Cobb v. *Balkcom*, 339 F.2d 95 15
Donnell v. *Nash*, 323 F.2d 850 15
Douglas v. *California*, 372 U.S. 353 26
Dowd v. *Cook*, 340 U.S. 206 41
Ex parte Aaron, 275 Ala. 377, 155 So.2d 334 15
Fay v. *Noia*, 372 U.S. 391 ..... 14, 27, 30, 32

Page

Foster v. *Illinois*, 332 U.S. 134 21
Frank v. *Mangum*, 237 U.S. 309 ..... 20, 21
General Oil Co. v. *Crain*, 209 U.S. 211 ..... 23, 24
Gideon v. *Wainwright*, 372 U.S. 335 ....5, 7, 10, 11, 14, 44
Hawk v. *Jones*, 160 F.2d 807 16
Hawk v. *O'Grady*, 137 Neb. 639, 290 N.W. 911 .. 39, 44
Hawk v. *Olson*, 66 F. Supp. 195 16
Hawk v. *Olson*, 146 Neb. 875, 22 N.W.2d 136 13
Hawk v. *Olson*, 326 U.S. 271 13
Hawk v. *State*, 151 Neb. 717, 39 N.W.2d 561 ..... 17, 18
Henry v. *Mississippi*, 379 U.S. 443 .....9, 27, 29, 30, 31, 32, 37, 41
Herman v. *Claudy*, 350 U.S. 116 11
House v. *Mayo*, 324 U.S. 42 11
Hovey v. *Elliot*, 167 U.S. 409 ..... 25, 26
Hunt v. *Warden*, 335 F.2d 936 14
In re Application of Dunn, 150 Neb. 669, 35 N.W.2d 673 .....13, 39, 44
Jackson v. *Denno*, 378 U.S. 368 .....29, 30, 41
Jackson v. *Olson*, 146 Neb. 885, 22 N.W.2d 124 .. 13
Jennings v. *Illinois*, 342 U.S. 104 28
Johnson v. *Zerbst*, 304 U.S. 458 .....10, 11, 14, 44, 45
Kenny v. *Supreme Lodge*, 252 U.S. 411 24
Loftus v. *Illinois*, 334 U.S. 804 27
Mapp v. *Ohio*, 367 U.S. 643 32
McKnett v. *St. Louis & S.F. Ry.*, 292 U.S. 230 .... 24, 42, 45
Mooney v. *Holohan*, 294 U.S. 103 .....8, 20, 21, 23
Moore v. *Dempsey*, 261 U.S. 86 ..... 20, 21
Moore v. *Michigan*, 355 U.S. 155 11
New York ex rel. Whitman v. *Wilson*, 318 U.S. 688 21
People v. *Huntley*, 15 N.Y.2d 72, 204 N.E.2d 179 14
People v. *Wilson*, 239 N.Y.S.2d 900 15
Rice v. *Davis*, 366 S.W.2d 153 14
Rice v. *Olson*, 324 U.S. 786 5
Robb v. *Connolly*, 11 U.S. 624 23
Rogers v. *Richmond*, 365 U.S. 534 30
Selicow v. *Dunn*, 100 Neb. 615, 160 N.W. 991 40

	Page
Shelton v. *Tucker*, 364 U.S. 479	11
Shupe v. *Sigler*, 230 F. Supp. 601	18
Smith v. *Bennett*, 365 U.S. 708	27
Smith v. *O'Grady*, 312 U.S. 329	2, 11
State v. *Boles*, 131 S.E.2d 722	14
Swanson v. *State*, 148 Neb. 155, 26 N.W.2d 595	17, 18
Taylor v. *Alabama*, 335 U.S. 252	22
Testa v. *Katt*, 330 U.S. 386	9, 10, 24, 43, 45
Townsend v. *Sain*, 372 U.S. 293	35
Ward v. *Love County*, 253 U.S. 17	24
White v. *Ragen*, 324 U.S. 760	2
Williams v. *Kaiser*, 323 U.S. 471	11
Woods v. *Nierstheimer*, 328 U.S. 211	17, 37
Yakus v. *United States*, 321 U.S. 414	26
Young v. *Ragen*, 337 U.S. 235	22, 27, 28

STATUTES AND RULES:

United States Code, Title 28	
§ 2254	34
Nebraska Revised Statutes, 1943:	
§ 25-21,149	19, 39
§ 25-101	40
§ 25-852	40
§ 25-1912 (1963 Supp.)	19
§ 28-532	3
§ 29-1803	4
§ 29-1911	26
§ 29-2103	18
§ 29-2221	3
§ 29-2801	13
§ 29-2803	45
§ 29-2805	45
Acts of Arkansas, 1959, Vol. 2, 1161	33
Alaska S.C. Rule 35(b)	33
Del. Superior Court Rules of Crim. Proc., Rule 35	33
Ill. Rev. Stat. ch. 38, §§ 122-1–122-7	33, 36

Page

Maine Rev. Stat. Ann. ch. 126, § 1-A (1963 Supp.) 33
Md. Ann. Code, art. 27, §§ 645-A–645-J 33
Mo. Rules of the Supreme Court, Rule 27.26 33
N.C. Gen. Stat. §§ 15-217–15-222 33
N.J. Crim. Practice Rules of Superior and County Courts, Rule 3:10 A-2 33
Ore. Rev. Stat. §§ 138.510–138.680 33
Uniform Post-Conviction Procedure Act 32

MISCELLANEOUS:

ABA, Section on Judicial Administration, Effective State Post-Conviction Procedures—Their Nature and Essentialities 33, 36
Brennan, Federal Habeas Corpus and State Prisoners, 7 Utah L. Rev. 423 33
Brennan, Some Aspects of Federalism 15
Council of State Governments, Conference of Chief Justices, 1963 31
Congressional Record, Vol. 110, 14678-14684 31
Desmond, Federal and State Habeas Corpus: How to Make Two Parallel Judicial Lines Meet, 49 A.B.A.J. 1166 32
Desmond, Federal Habeas Corpus Review of State Court Convictions—Proposals for Reform, 9 Utah L. Rev. 18 32
F.R.D., Vol. 33, pp. 365-390 31
F.R.D., Vol. 33, pp. 423-505 33
Hart, The Relations Between State and Federal Law, 54 Colum. L. Rev. 489 24
H.R. 1835, 88th Cong., 2d Sess. 31
H.R. Rep. No. 1384, 88th Cong., 2d Sess. 31
Jenner, The Illinois Post-Conviction Hearing Act, 9 F.R.D. 347 36
Meador, Accommodating State Criminal Procedure and Federal Post-Conviction Review, 50 A.B.A.J. 928 15
National Ass'n of Att'ys Gen., 1962 31
National Ass'n of Att'ys Gen., 1964 15

Page

Note, Effect of the Federal Constitution in Requiring State Post-Conviction Remedies, 53 Colum. L. Rev. 1143 ..... 29, 45

Note, Federal Habeas Corpus for State Prisoners: The Isolation Principle, 39 N.Y.U. L. Rev. 78 33

Reitz, Federal Habeas Corpus: Postconviction Remedy for State Prisoners, 108 U. of Pa. L. Rev. 461 33

Uniform Laws Ann., Vol. 9B, pp. 352-59 32

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 843

PAUL V. CASE,

Petitioner,

vs.

STATE OF NEBRASKA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

BRIEF FOR THE PETITIONER

Opinion Below

The opinion of the Supreme Court of Nebraska (R. 22-29) is reported at 177 Neb. 404, 129 N.W.2d 107.

Jurisdiction

The judgment of the Supreme Court of Nebraska was entered on June 19, 1964 (R. 30). The petition for a writ of certiorari was filed on July 11, 1964, and was granted on January 18, 1965 (R. 31). The jurisdiction of the Court rests on 28 U.S.C. § 1257(3).

Statutes Involved

Pertinent statutes of the State of Nebraska are set out in Appendix A, *infra*.

Questions Presented

1. Whether this Court will require a State to comply with the constitutional command to provide some means whereby a prisoner can be heard on his claim that he is confined in violation of his constitutional right to counsel.

2. Whether a State which makes the writ of habeas corpus available to attack void convictions may discriminate against federal law by allowing the writ for violations of state law which render a conviction void while denying the writ for violations of the right to counsel which likewise render a conviction void.

Statement

The Petitioner, Paul V. Case, is confined under a sentence for burglary in the Nebraska Penal and Correctional Complex. He commenced this habeas corpus proceeding *in forma pauperis* in the District Court for Lancaster County, Nebraska, on September 9, 1963. His petition and accompanying papers show the following facts.[1]

On the night of April 14-15, 1963, petitioner was stopped by the police while he was walking along a street in Lincoln, Nebraska. He was taken into custody, and at about 1 A.M.

[1] Since the petition was dismissed with neither a response from the state nor a hearing, the facts alleged and appearing from the attached papers must be taken as true. *White* v. *Ragen*, 324 U.S. 760; *Smith* v. *O'Grady*, 312 U.S. 329. Petitioner was not represented by counsel in the courts below.

on April 15th he was "booked" by the police on an "open charge." From then until noon of April 18th—four days later—he was held in the city jail incommunicado and in solitary confinement (R. 4-5).

On April 18th an information signed by William D. Blue, the chief deputy prosecuting attorney of Lancaster County, was filed against petitioner in the District Court for Lancaster County. It charged petitioner with unlawfully breaking and entering a dwelling in the city of Lincoln on April 14, 1963, with intent to steal property (R. 9). (Under Nebraska law this is a felony carrying a penalty of from 1 to 10 years in the penitentiary.)[2] On the same day the information was filed—April 18th—without having had any contact with counsel, petitioner was brought before Deputy Prosecutor Blue. Blue threatened petitioner with prosecution under the state's habitual criminal act[3] unless he waived preliminary hearing, waived his right to counsel, and pleaded guilty (R. 3-4, 5, 8).

Thereafter, still on April 18th, petitioner came before the district court. The court's journal entry recites:

> Now on this day comes the Deputy County Attorney, William D. Blue, on behalf of the State of Nebraska and defendant appears in court and after waiving his constitutional rights, said defendant standing at the bar of this court in open court is duly arraigned on the information filed against him herein, and said

[2] Neb. Rev. Stat. § 28-532. (The text of this statute appears in Appendix A, *infra*.) Petitioner later filed another habeas corpus petition in the state court attacking this burglary statute for vagueness. A dismissal of that petition was affirmed in *Case* v. *Nebraska*, 177 Neb. 774, 131 N.W.2d 191 (1964).

[3] Neb. Rev. Stat. § 29-2221, the habitual criminal law, provides that for two convictions a person will be sentenced to not less than 10 nor more than 20 years in the penitentiary. The record does not reveal petitioner's prior criminal record.

> information having been read to him, he is duly inquired of by the Court whether he is guilty or not guilty of the offense charged against him in said information, and the defendant for his answer thereto says he is "Guilty." The Court accepts said plea and finds the defendant guilty as charged (R. 10).

Sentencing was then deferred pending a pre-sentence investigation. "At *no time* was counsel present in the Court for the benefit of the defendant—or to advise him of his rights"[4] (R. 6).

Petitioner alleges in his habeas corpus petition that he was "fast talked" and "forcibly coerced" into waiving his right to have the advice of counsel, his right to have a preliminary hearing, and his right to plead not guilty (R. 3). Mr. Blue, the prosecutor, "did willfully, forcefully, and feloniously coerce and harass this Petitioner into waiving his fundamental Constitutional Rights—contrary to the laws and guarantees of the U.S. Constitution as set forth in the Sixth Amendment and made forcing [sic] on the State of Nebraska by the Fourteenth Amendment" (R. 8).

On May 2, 1963, petitioner was again brought before the court and was sentenced to five years imprisonment in the Nebraska Penal and Correctional Complex (R. 11). He is now confined there under that sentence (R. 2-3, 12). Apparently no motion for new trial was filed and no appeal was taken.

On September 9, 1963, petitioner commenced the instant proceeding by filing a petition for habeas corpus in the District Court for Lancaster County, the court where he was convicted and sentenced. Without holding a hearing and without any response from the state, the district court dis-

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[4] Neb. Rev. Stat. § 29-1803 (1963 Supp.) requires appointment of counsel.

missed the petition. No opinion was written. The order stated only that "the Court finds that the petition does not state facts sufficient to require the issuance of the Writ of Habeas Corpus asked by the petitioner and does not state a cause of action for the issuance of the Writ" (R. 16). The petitioner thereupon took an appeal to the Supreme Court of Nebraska (R. 17).

In its opinion affirming the dismissal, the Nebraska Supreme Court set forth petitioner's factual allegations and then discussed *Gideon* v. *Wainwright*, 372 U.S. 335, and other decisions of this Court concerning the right to counsel. The court noted that the due process clause guarantees the assistance of counsel unless it is understandingly waived and that courts must indulge every reasonable presumption against a waiver of fundamental constitutional rights. Quoting from *Carnley* v. *Cochran*, 369 U.S. 506, which in turn referred to *Rice* v. *Olson*, 324 U.S. 786, the Nebraska court noted that the appearance at trial of an accused without counsel, the silence of the record as to a request for counsel, and the entry of a guilty plea might raise a factual issue as to whether the accused understandingly waived his rights, an issue which if disputed required a hearing. Here, the court noted, the petitioner alleged that he did waive counsel but he also alleged that the waiver was the result of official coercion. The court acknowledged that this coercion would vitiate the waiver, but, it added: "Whether the facts in the cause before us would show any such coercion is not before us and in view of our decision could not come before us in this type of action" (R. 26).

The Nebraska Supreme Court then proceeded to discuss the scope and function of the state's writ of habeas corpus. "Habeas corpus is not available," it said, quoting from earlier decisions, "to discharge a prisoner from a sentence

of penal servitude if the court imposing it had jurisdiction of the offense and of the person charged with the crime, and the sentence was within the power of the court" (R. 27). Viewing petitioner's claim as not within this scope, the court held that the Nebraska courts were without jurisdiction to review this conviction in a habeas corpus proceeding. Accordingly, the district court's dismissal of the petition was affirmed (R. 30). The opinion did not mention whether there was any other remedy open to petitioner in the Nebraska courts.

The petitioner thereupon sought review of the Nebraska judgment by a petition for certiorari in this Court. Upon request of this Court the state filed a response stating: "For all practical purposes, there is no collateral remedy available in the Nebraska courts to a state prisoner who alleges that a violation of his federal constitutional rights occurred in connection with his conviction and whose claim has not yet been considered by the state courts, unless the prisoners' claim is predicated upon a lack of jurisdiction of the sentencing court over the offense or over the person of the accused."

Certiorari was granted on January 18, 1965, along with leave to proceed *in forma pauperis* (R. 31). 379 U.S. 958. Counsel was thereafter appointed to represent petitioner. 379 U.S. 995.

Summary of Argument

I.

Petitioner's allegations, which must be accepted as true at this point, show that after being arrested and held incommunicado for four days he was charged with burglary, a felony punishable by ten years in the penitentiary. He was then and there threatened by the prosecuting attorney with prosecution under the state's habitual criminal law unless

he would waive his right to counsel, waive preliminary hearing, and agree to plead guilty. As a result of this coercion petitioner did give up his right to counsel and did plead guilty. On that plea he was found guilty and sentenced to five years imprisonment. At no time from arrest through sentencing did petitioner have the assistance of a lawyer.

These allegations show prima facie a violation of the Fourteenth Amendment. The right to counsel established unqualifiedly for a state accused in *Gideon* v. *Wainwright*, 372 U.S. 335, cannot be taken from the accused by official coercion such as this. The coercion vitiates the purported "waiver" of counsel. Accordingly, if the state denies the allegations of coercion, which it has not yet done, petitioner is entitled to an evidentiary hearing. If he proves his allegations, or if they go undenied by the state, the conviction and sentence must be set aside. But the Nebraska court has dismissed the petition without any response from the state and without holding a hearing.

II.

The Nebraska court's dismissal of the petition without a hearing, together with Nebraska law as a whole, shows that the state provides *no* remedy for petitioner. Habeas corpus is unavailable, as the court held in this very case, because it lies only for jurisdictional defects in the conviction and under the Nebraska view this does not include violation of the right to counsel. Coram nobis is unavailable because it lies only if the facts on which the claim rests were unknown and undiscoverable by the petitioner at the time of his trial; the facts on which the right to counsel is based here were known to petitioner during his trial. The time for filing a new trial motion and for appealing has expired. Thus no corrective process for this constitutional violation exists in Nebraska. The state, in its response to the certiorari petition, expressly concedes this.

Beginning at least with *Mooney* v. *Holohan*, 294 U.S. 103, 113, this Court has often said that a state is constitutionally required to provide corrective process for due process violations in its criminal prosecutions. This is an aspect of the fundamental right to be heard in one's defense. Due process forbids a state to incarcerate a man without affording him some adequate means to be heard on his claim that his incarceration contravenes the United States Constitution. The Supremacy Clause and the Fourteenth Amendment together require this. A state prisoner thus has a due process right to corrective process for due process violations in his conviction. Nebraska, by the judgment refusing a hearing in this case, has disobeyed the constitutional command to furnish a remedy for transgressions of the Fourteenth Amendment. There is, accordingly, no valid state ground on which the judgment can stand.

The fact that a new trial motion and appeal are provided for by Nebraska law and were theoretically available to petitioner at one time does not necessarily mean that he has had a constitutionally adequate opportunity to litigate his claim. Since the claim involves pre-trial coercion and thus rests on facts outside the record it could not have been asserted on appeal. Apart from this, a new trial motion or appeal would not have been adequate if petitioner was without counsel and was unable to obtain counsel; other circumstances may also have made those remedies ineffective. The adequacy of the prior remedies thus depends on facts which only an evidentiary hearing can divulge. But Nebraska has refused to conduct any inquiry. On this record, it cannot be said that petitioner has or has ever had any realistically effective corrective process.

In the past the Court has responded to defaults of state corrective process by making federal corrective process available. To this end federal habeas corpus has been given

broad scope. The continued failure of many states to meet their constitutional obligation has caused state prisoners asserting due process defects in their convictions to resort increasingly to the federal district courts. This in turn has brought the federal judiciary increasingly into state criminal administration, thereby heightening state-federal friction. This situation can be altered by the Court's now enforcing the constitutional requirement of state corrective process. State cases would then be disposed of in the state courts with a much higher degree of finality than at present, and mounting federal dockets would be substantially relieved. Harmonious federalism would be fostered, as the Court noted in *Henry* v. *Mississippi*, 379 U.S. 443, in remanding for a hearing in the state courts rather than relegating the prisoner to federal habeas corpus as in the past. This case should therefore be remanded for Nebraska to comply with the Constitutional mandate to afford petitioner a remedy.

III.

Nebraska law allows habeas corpus to attack a conviction which is void or where the convicting court lacked jurisdiction. But Nebraska refuses to make habeas corpus available where such invalidity rests on federal law; the only grounds of voidness or lack of jurisdiction which the Nebraska courts will litigate on habeas corpus are those based on state law. This is an unconstitutional discrimination against federal law.

Under the reasoning of *Testa* v. *Katt*, 330 U.S. 386, the Supremacy Clause forbids a state to refuse to entertain federal law claims if it entertains similar state law claims and has judicial machinery appropriate for litigating the federal claim. Habeas corpus in Nebraska is appropriate for holding an evidentiary hearing and adjudicating peti-

tioner's asserted denial of right to counsel. Under *Johnson* v. *Zerbst*, 304 U.S. 458, made applicable to the states by *Gideon* v. *Wainwright*, 372 U.S. 335, a court lacks jurisdiction to enter judgment, and its proceedings are void, unless the constitutional guaranty of counsel is met. Nebraska's refusal to hear this jurisdictional claim grounded on federal law, while at the same time hearing similar jurisdictional claims grounded on state law, contravenes the principle of *Testa* v. *Katt*. On this theory, independently of the state's obligation to provide corrective process, the case should be remanded with directions that petitioner be given a hearing.

ARGUMENT

I.

Petitioner's Allegations Show a Violation of the Constitution in That He Was Tried and Convicted Without the Assistance of Counsel After Being Coerced to Waive Counsel and Plead Guilty.

At this stage in the evolution of the right to counsel under the Fourteenth Amendment little argument or citation is needed to demonstrate that petitioner has alleged a violation of that right in this case. The papers filed by petitioner in the Nebraska trial court show that he was arrested and held incommunicado for three days; on the fourth day he was charged with burglary and was convicted on a plea of guilty entered without the assistance of counsel; counsel was waived and the guilty plea entered as the result of coercion and threats by the prosecuting attorney. For present purposes these facts must be accepted as true since they are uncontradicted.[5]

[5] See note 1, *supra*.

It is clear that a "waiver" of counsel extracted by coercion is ineffective. A person cannot be compelled to surrender a right given him by the Federal Constitution. Cf. *Shelton* v. *Tucker*, 364 U.S. 479. A waiver, to be constitutionally binding, must be made voluntarily as well as understandingly. There can be no "intentional relinquishment or abandonment of a known right or privilege" (*Johnson* v. *Zerbst*, 304 U.S. 458, 464) where the accused is threatened with an additional prosecution as an habitual criminal, a prosecution which would result in a minimum of ten years in the penitentiary on top of whatever sentence he might get on the burglary charge.

Since the conviction here rests upon an unrepresented defendant's plea of guilty which was the product of prosecutorial threats, the case is similar to numerous others in which this Court has held that allegations of an uncounseled guilty plea showed prima facie a violation of the Fourteenth Amendment. See, e.g., *Smith* v. *O'Grady*, 312 U.S. 329; *Williams* v. *Kaiser*, 323 U.S. 471; *House* v. *Mayo*, 324 U.S. 42; *Rice* v. *Olson*, 324 U.S. 786; *Herman* v. *Claudy*, 350 U.S. 116; *Moore* v. *Michigan*, 355 U.S. 155. Discussion of "special circumstances" in some of those opinions would be irrelevant today in light of *Gideon* v. *Wainwright*, 372 U.S. 335, decided before petitioner's trial took place. The constitutional violation in those earlier cases would be even plainer now since an accused's right to counsel in state courts when faced with a serious charge such as burglary is unqualified, unless effectively waived. And the purported waiver here was vitiated by coercion.

The Nebraska Supreme Court recognized that petitioner's papers stated sufficient facts to require a hearing and that if the alleged coercion were established by evidence petitioner would have made out a violation of the Constitution (R. 25-26). The court refused to order the hearing, how-

ever, because of its holding that habeas corpus was unavailable for this kind of claim.

II.

The Nebraska Judgment Must Be Set Aside and the Case Remanded Because the State, by Refusing to Hear Petitioner's Claim, Has Breached Its Constitutional Obligation to Provide a Remedy for a Person Deprived of His Liberty in Violation of the Federal Constitution.

A. *Nebraska Provides No Corrective Process for Determining the Constitutionality of Petitioner's Imprisonment.*

That no procedure exists in the Nebraska courts whereby petitioner can be heard on his claim of unconstitutional imprisonment has been expressly conceded by the Attorney General of Nebraska in his response to the certiorari petition filed in this Court. (This portion of the response is quoted at page 6, *supra.*) That is perhaps enough to settle the point for this litigation. But apart from the concession the non-existence of any remedy in the state courts can be established from a review of Nebraska law.

1. Habeas Corpus Unavailable

The Nebraska Supreme Court, the authoritative judicial voice of the state, has made clear in this very case that the writ of habeas corpus is not available to petitioner to litigate the federal claim he is here asserting. The court affirmed the trial court's dismissal of the petition, saying that "under the statutes of this state and the decisions of this court, we have no jurisdiction to review the conviction of the petitioner in a habeas corpus proceeding" (R. 29). This holding alone suffices to establish this point.

Under this long-standing view of the Nebraska court, judicial inquiry on habeas corpus brought by a convicted prisoner is limited to the jurisdiction of the convicting court over the offense and over the person of the accused and to the question whether the sentence imposed was within the power of the court. It is also said that for relief to be granted on habeas corpus the sentence must be "absolutely void." See, e.g., in addition to the opinion in the instant case, *Jackson* v. *Olson,* 146 Neb. 885, 893-94, 22 N.W.2d 124, 129-30 (1946), and cases there cited. This judicial position rests in part on language in the state habeas corpus statute. The statute makes the writ available to one unlawfully deprived of his liberty "except persons convicted of some crime or offense for which they stand committed . . ." Neb. Rev. Stat., § 29-2801. (For complete text of this statute see Appendix A, *infra.*) The court apparently construes this statutory language to read *"validly* convicted," thereby justifying the writ where the conviction is "void" or rendered without "jurisdiction." *In re Application of Dunn,* 150 Neb. 669, 35 N.W.2d 673 (1949).

The Nebraska view, however, as to what will show a conviction to be void or to have been rendered without jurisdiction does not include a violation of the Fourteenth Amendment right to counsel.[6] This was made dramatically clear after this Court's reversal of the Nebraska court in *Hawk* v. *Olson,* 326 U.S. 271, a case in which a right-to-counsel claim was asserted on state habeas corpus. On remand the state supreme court reiterated that habeas corpus was unavailable; it took the unusual step of refusing to order a hearing in the trial court despite the direction to do so in this Court's mandate. *Hawk* v. *Olson,* 146 Neb. 875, 22 N.W.2d 136 (1946). As the instant case shows, this

[6] This in itself forms an independent basis for a reversal by this Court in this case. See Part III of the Argument, *infra.*

view as to the scope of the writ has been adhered to despite such decisions by this Court as *Johnson* v. *Zerbst*, 304 U.S. 458, *Gideon* v. *Wainwright*, 372 U.S. 335, and *Fay* v. *Noia*, 372 U.S. 391.

In the present proceeding the petitioner argued to the Nebraska court that in light of these recent developments the state's habeas corpus should now be opened up to his claim. As the Nebraska court stated it:

> The petitioner now urges that because of the decisions of the Supreme Court of the United States hitherto discussed, Gideon v. Wainwright, *supra*, together with the rules respecting the appointment of counsel and the requirements as to the waiver of counsel in Carnley v. Cochran,[1] *supra*, and other similar federal cases, the courts of this state should now consider the evidence relating to the sufficiency of the petitioner's waiver of counsel and plea of guilty in a habeas corpus as well as in a direct proceeding in error or by appeal (R. 29).

But the court below explicitly rejected this suggestion, saying that Nebraska law remained "unchanged" (R. 29). The writ appears not to be available for any Fourteenth Amendment violation.

It may be noted that in response to arguments similar to petitioner's, based on the evolving pattern of this Court's adjudications on due process and federal habeas corpus, the courts in some states have by judicial construction broadened the scope of their post-conviction collateral remedies to allow a claim like petitioner's to be litigated. See, e.g., *Rice* v. *Davis*, 366 S.W.2d 153 (Ky. 1963); *State* v. *Boles*, 131 S.E.2d 722, 728 (W. Va. 1963); *People* v. *Huntley*, 15 N.Y.2d 72, 204 N.E.2d 179 (1965); *Hunt* v. *Warden*,

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[1] 369 U.S. 506.

335 F.2d 936, 941-42 (4th Cir. 1964) (discussing the expanding Maryland remedy). Other judges have at least suggested doing this. E.g., *People* v. *Wilson*, 18 App. Div. 2d 424, 430, 239 N.Y.S.2d 900, 906 (1st Dep't 1963); *Ex parte Aaron*, 275 Ala. 377, 381-82, 155 So.2d 334, 337-38 (1963) (dissenting opinion); *Donnell* v. *Nash*, 323 F.2d 850 (8th Cir. 1963) (discussing the possibility of a broadened Missouri remedy); *Cobb* v. *Balkcom*, 339 F.2d 95, 100 (5th Cir. 1964) (commenting on Georgia's procedure). The states also have been urged on various occasions to make their post-conviction procedures coextensive with federal habeas corpus.[8] But the Nebraska Supreme Court thus far has elected not to follow such a course. For not only is habeas corpus closed to petitioner's claim that he is incarcerated in violation of his constitutional right to counsel, but there is also no other machinery in Nebraska presently available for this purpose.

2. Coram Nobis Unavailable

The writ of error coram nobis is recognized in Nebraska but with such a circumscribed function that it affords no avenue of relief for petitioner. The leading Nebraska decision on coram nobis is *Carlsen* v. *State*, 129 Neb. 84, 261 N.W. 339 (1935), the first authoritative pronouncement that this venerable common law writ exists there at all. In that opinion the court carefully reviewed the pertinent history and concluded: "The writ of error *coram nobis*, to bring into the record facts which were unknown to the defendant at the time of the trial through no lack of reasonable dili-

[8] See Brennan, Some Aspects of Federalism 19-21 (address to Conference of Chief Justices, Aug. 7, 1964); National Ass'n of Att'ys Gen., Conference Proceedings, 1964, pp. 42-43 (remarks of Arthur J. Sills, Att'y Gen. of New Jersey), 149-50 (resolution of the Association); Meador, Accommodating State Criminal Procedure and Federal Post Conviction Review, 50 A.B.A.J. 928 (1964).

gence on his part which, if known at the time of trial, would have resulted in a different judgment, exists in this state . . . Coram nobis does not lie to bring into the record facts known to the petitioner before judgment." (261 N.W. at 346, 347.)

In the instant case petitioner, in the nature of things, knew full well at the time of his burglary trial that he had no counsel, that he had been coerced to waive counsel and coerced to plead guilty. Since he knew those facts at that time, coram nobis, by the Nebraska view, is unavailable. This has been made clear by further adjudication in Nebraska since the definitive *Carlsen* opinion.

The unavailability of coram nobis is shown dramatically in the long drawn efforts of Henry Hawk to litigate his claim that he was denied the effective assistance of counsel in a Nebraska prosecution for homicide. (This litigation is traced in its entirety in Appendix B, *infra.*). After several abortive attempts to get a hearing, Hawk filed a habeas corpus petition in the federal district court. *Hawk* v. *Olson,* 66 F. Supp. 195 (D. Neb. 1946).[9] The district judge was presented with the question whether Hawk had exhausted his remedies in the Nebraska state courts. He noted that habeas corpus was unavailable as a result of the square holding to that effect in *Hawk* v. *Olson,* 146 Neb. 875, 22 N.W.2d 136 (1946). This turned the inquiry to coram nobis. Apparently the Nebraska attorney general, "in the face of the court's prompting," would not even so much as argue that coram nobis gave Hawk any remedy. (66 F. Supp. at 199.) The district judge nevertheless undertook a study of the question on his own. As a result, he "was led to an impression, perhaps not attaining the stature of an opinion, that, in the petitioner's plight, the ancient writ is

[9] Affirmed *sub nom., Hawk* v. *Jones,* 160 F.2d 807 (8th Cir.), *cert. denied,* 332 U.S. 779 (1947).

not practically available to him, and can hardly be more than a mirage to be pursued only to inevitable despair." (66 F. Supp. at 199.) This was because Hawk at the time of his trial, like petitioner here, knew the facts on which his federal claim was based. Despite this well-formed conclusion, the district judge felt compelled by a then recent decision of this Court[10] to deny relief pending further efforts by Hawk in the state courts. Hawk thereupon filed a petition for coram nobis in the Nebraska court.

The federal judge's "impression" proved to be correct; coram nobis did indeed turn out to be a "mirage." The Nebraska Supreme Court affirmed the trial court's dismissal of the coram nobis petition, reciting that "Where the facts alleged are known to the applicant before or during the progress of the trial, or could have been known by the exercise of reasonable diligence, the writ must be denied." *Hawk* v. *State*, 151 Neb. 717, 720, 39 N.W.2d 561, 565 (1949).[11] This was in line with the previous decision of *Swanson* v. *State*, 148 Neb. 155, 26 N.W.2d 595 (1947), holding, for the same reason, that coram nobis was unavailable to pass on a claim of ineffective representation of counsel.

Only last year another Nebraska prisoner filed a habeas corpus petition in the federal district court with allegations of deprivation of counsel and a coerced plea of guilty similar to petitioner's allegations in the instant case. Again the question of exhaustion of state remedies was presented. On this occasion the federal judge, with the benefit of the *Hawk* litigation eighteen years earlier as well as other more recent Nebraska decisions, concluded unequivocally that neither habeas corpus nor coram nobis could be employed

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[10] *Woods* v. *Nierstheimer*, 328 U.S. 211.

[11] Thereafter federal habeas corpus issued and Hawk was ordered released. He died a month later, 17 years after his conviction. See Appendix B, *infra*.

in Nebraska to hear this claim. Coram nobis was not open because, as in the instant case, the facts on which the claim rested were known to the accused at the time of his trial. The federal judge thus held that for petitioner's claim there was no presently available remedy in Nebraska. *Shupe* v. *Sigler*, 230 F. Supp. 601 (D. Neb. 1964).

This survey reveals that for three decades with undeviating consistency the Nebraska Supreme Court has said that coram nobis is defeated where the petitioner, as here, knew at his trial of the facts supporting his claim. And two federal district judges in Nebraska have so read the Nebraska decisions. That coram nobis is closed to petitioner is thus not merely a debatable inference drawn from generalized pronouncements. This remedy has been held unavailable explicitly by both state and federal courts in the face of Fourteenth Amendment claims of infringement of right to counsel like that which petitioner here asserts. *Hawk* v. *State, supra; Swanson* v. *State, supra; Shupe* v. *Sigler, supra.* There is no scintilla of evidence in Nebraska law which would enable this Court to infer that coram nobis might possibly be available. On the contrary, all the evidence suggests that the Nebraska court's repeated declaration as to the scope of that writ is to be believed, as is the concession of the state's attorney general in this case (page 6, *supra*).

3. No Other Remedies Presently Available

Other possible remedies in the state courts have been closed to petitioner long ago. Under Nebraska law a motion for new trial in a criminal case must be filed within ten days of verdict. Neb. Rev. Stat. § 29-2103. (Appendix A.) For newly discovered evidence this time is extended to three years, but petitioner cannot invoke that ground; his claim rests on no such new evidence. Direct appellate review of a

conviction may be had only if a notice is filed in the trial court within one month after judgment. Neb. Rev. Stat. § 25-1912 (1963 Supp.). (Appendix A.) Since petitioner was found guilty on April 18, 1963, and was sentenced on May 2, 1963—nearly two years ago—he is foreclosed from moving for a new trial and from seeking direct review in the state supreme court.

Nebraska has a typical declaratory judgment statute. Neb. Rev. Stat. § 25-21,149. (Appendix A.) But there is nothing in all the state's law to suggest even a remote possibility that this furnishes a mode of litigating petitioner's claim. Declaratory actions are not usually considered part of the criminal process in any jurisdiction. In view of Nebraska's refusal to make the traditional prisoners' remedies of habeas corpus and coram nobis available for this claim, it is certain that the state courts would not view a declaratory action as appropriate.

The inescapable result is that Nebraska is today confining the petitioner in its prison without providing any way in which he can get a judicial determination that his confinement is in violation of the United States Constitution. The state's concession, filed with this Court, indeed settles this point. The decision below, therefore, is not merely a decision that the inappropriate state remedy has been selected. This is not a situation in which a complaining party has made, so it turns out, an incorrect choice among several possible procedural routes, the consequence of which is that he starts over again along the proper route. For here no route exists. The opinion below, if viewed in isolation, appears to hold only that habeas corpus does not lie in these circumstances. But when viewed, as it must be, in the totality of Nebraska jurisprudence, the decision is in

effect that the state provides no remedy for petitioner. As shown hereafter, the decision thus puts Nebraska in a position which no state can assume consistently with the Constitution.

B. *A State Is Constitutionally Required to Provide Corrective Process for Its Convicted Prisoners.*

The principle that a state is under a constitutional duty to provide a judicial remedy for a prisoner unconstitutionally convicted in its courts is now well established. Though the principle does not appear to have been directly enforced by the Court in a case such as this, its existence and validity have been expressly articulated numerous times without dissent. And its existence has often influenced the Court's disposition of cases.

The roots of the principle can be traced to a statement in *Frank* v. *Mangum*, 237 U.S. 309, 335: "And if the State, supplying no corrective process, carries into execution a judgment of death or imprisonment based upon a verdict thus produced by mob domination, the State deprives the accused of his life or liberty without due process of law." This was later quoted with apparent approval in *Moore* v. *Dempsey*, 261 U.S. 86, 91. Then in *Mooney* v. *Holohan*, 294 U.S. 103, 113, in response to the state's argument that it need furnish no remedy for a prisoner asserting a constitutional defect in his conviction, the Court said: "Reasoning from the premise that the petitioner has failed to show a denial of due process in the circumstances set forth in his petition, the Attorney General urges that the state was not required to afford any corrective judicial process to remedy the alleged wrong. The argument falls with the premise."

Translating this idea into the circumstances of this case, it can be said that Nebraska takes petitioner's liberty without due process of law in two ways if it (1) incarcerates him under a sentence imposed on a coerced waiver of counsel and plea of guilty and (2) at the same time withholds any process whereby this constitutional defect in the sentence can be litigated. The first due process violation concerns petitioner's original trial for burglary. Was he there denied counsel in violation of the Fourteenth Amendment? As already demonstrated, petitioner has alleged facts which, if true, make out such a violation; the ultimate merits of this claim are not now before the Court because they can only be determined by an evidential hearing. But the state has failed to grant a hearing, and this brings up the second due process violation the violation immediately before the Court in this case. The due process principle derived from *Frank, Moore,* and *Mooney,* requires the state to afford some means whereby petitioner can litigate his Fourteenth Amendment claim of denial of counsel. Fundamentally, this involves nothing less than the right to be heard. Specifically, in the present context, this is a prisoner's constitutional right to corrective process, which carries with it the correlative duty on the state to provide such process.

This constitutional right-duty has been acknowledged repeatedly by the Court in the thirty years snce *Mooney* v. *Holohan.* In 1943 in *New York ex rel. Whitman* v. *Wilson,* 318 U.S. 688, 690, the Court spoke of "the requirement of the Due Process Clause that a prisoner be granted a hearing on the merits" of a Fourteenth Amendment violation. A few years later in *Foster* v. *Illinois,* 332 U.S. 134, 139, the Court said that state prisoners must raise due process claims "by whatever procedure Illinois may provide or in default of relief by appropriate Illinois proceedings,

by a new claim of denial of due process for want of such relief. See Mooney v. Holohan. . . ." In *Carter* v. *Illinois,* 329 U.S. 173, 175-76, the Court said that "In respecting the duty laid upon them by Mooney v. Holohan . . ." states have a choice of remedies "so long as the rights under the United States Constitution may be pursued . . ." by some means.

In a concurring opinion in *Taylor* v. *Alabama,* 335 U.S. 252, Justice Frankfurter noted that the conviction under attack had been reviewed on appeal by a state court; but, he added:

> "The Due Process Clause of the Fourteenth Amendment does require still further protection. A State must furnish corrective process to enable a convicted person, even after such proceedings as I have outlined, to establish that in fact a sentence was procured under circumstances which offend "the fundamental conceptions of justice which lie at the base of our civil and political institutions." (335 U.S. at 272.)

When in *Young* v. *Ragen,* 337 U.S. 235, state prisoners sought unsuccessfully to attack their convictions in the state courts for due process violations, the full Court made plain the state's federally imposed duty:

> But it is not simply a question of state procedure when a state court of last resort closes the door to *any* consideration of a claim of denial of a federal right. And that is the effect of the denials of *habeas corpus* in a number of cases now before this Court, for in none of the cases does the Attorney General suggest that either of the other two Illinois post-trial remedies, writ of error or *coram nobis,* is appropriate. Unless habeas corpus is available, therefore, we are led to be-

> lieve that Illinois offers no post trial remedy in cases of this kind . . . We recognize the difficulties with which the Illinois Supreme Court is faced in adapting available state procedures to the requirement that prisoners be given some clearly defined method by which they may raise claims of denial of federal rights. Nevertheless that requirement must be met. (337 U.S. at 238-39.)

This requirement is merely a particularized aspect of a broader principle. That principle is that state courts, absent a valid excuse, must entertain and adjudicate federal claims, a requirement placed on them by the Supremacy Clause of the Constitution. A relatively early statement of this, which was cited by the Court in *Mooney* v. *Holohan*, appears in *Robb* v. *Connolly*, 111 U.S. 624, 637:

> Upon the State courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them; for the judges of the State courts are required to take an oath to support that Constitution, and they are bound by it . . . as the supreme law of the land "anything in the Constitution or laws of any state to the contrary notwithstanding."

This theory underlies *General Oil Co.* v. *Crain*, 209 U.S. 211. In that case a suit was brought by a corporation in a Tennessee state court to enjoin a state official from collecting a tax alleged to infringe the corporation's immunity under the Commerce Clause. The state court refused to entertain the case on the basis of a Tennessee statute which provided that no court of the state had jurisdiction over this type of suit. Despite argument that this was an ade-

quate state ground to support the Tennessee judgment, this Court took jurisdiction and reviewed the federal constitutional claim on its merits. The Court, at one point in its opinion, said: "It being then the right of a party to be protected against a law which violates a constitutional right . . . . it is manifest that a decision which denies such protection gives effect to the law . . ." (209 U.S. at 228).[12]

The *General Oil* case was said by Justice Holmes, writing for the majority in *Kenny* v. *Supreme Lodge,* 252 U.S. 411, to foreshadow the decision in *Kenny* that Illinois could not decline to enforce an Alabama judgment on the ground that its courts lacked jurisdiction. The full faith and credit clause compelled Illinois to give effect to the Alabama judgment, and "it is plain that a state cannot escape its constitutional obligations by the simple device of denying jurisdiction in such cases to courts otherwise competent." The state had "attempted to achieve a result that the Constitution of the United States forbad." (252 U.S. at 415.)

For other decisions reversing state court refusals to provide a remedy for asserted federal rights see *Ward* v. *Love County,* 253 U.S. 17; *McKnett* v. *St. Louis & S. F. Ry.,* 292 U.S. 230; *Testa* v. *Katt,* 330 U.S. 386. In each of those cases the state court was compelled to respect its constitutional obligation to adjudicate claims grounded on federal law. Those were all civil proceedings initiated by parties with economic interests at stake. If there is an enforceable constitutional duty on the state to furnish means for litigating those claims, surely when the state itself sets its

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[12] As one commentator described *General Oil,* "the Court said plainly that the Tennessee courts could not refuse, on the ground that the courts of the state were without jurisdiction, to entertain an action to enjoin a state taxing official from enforcing a tax alleged to violate the Federal Constitution." Hart, The Relations Between State and Federal Law, 54 Colum. L. Rev. 489, 507 n. 59 (1954).

criminal process in motion against a person with the object of putting him in prison the state carries an equally enforceable constitutional duty to allow some way for that person to litigate his claim that the state is acting unconstitutionally.

The right is essentially the right to be heard. As such it is among the most fundamental of all safeguards in a government under law. Indeed the right to counsel or any of the other Fourteenth Amendment rights protecting a person under prosecution would be worth little if there were no way for them to be asserted. Constitutional rights exist only at the sufferance of prosecuting officials unless there is some way an accused can invoke a court's protection for their vindication. Long ago the Court addressed itself to an analogous point in *Hovey* v. *Elliott*, 167 U.S. 409, 417-18:

> Can it be doubted that due process of law signifies a right to be heard in one's defense? If the legislative department of the government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever of being heard, would it be pretended that such an enactment would not be violative of the Constitution? If this be true, as it undoubtedly is, how can it be said that the judicial department, the source and fountain of justice itself, has yet authority to render lawful that which if done under express legislative sanction would be violative of the Constitution. If such power obtains, then the judicial department of the government sitting to uphold and enforce the Constitution is the only one possessing a power to disregard it.

Suppose, as a specific example, that a federal district court in a criminal prosecution refused to permit the defendant to be heard on the question of the constitutionality of the Act of Congress on which the prosecution was based.

Can it be doubted that this Court would hold this to be contrary to due process, assuming that there had been no prior adequate opportunity for the constitutional question to be adjudicated? See *Yakus* v. *United States*, 321 U.S. 414.

On this record, Nebraska has imprisoned petitioner for five years "without any opportunity whatever of being heard" (*Hovey* v. *Elliott, supra*) on his claim that he was condemned in disregard of his fundamental right to the assistance of legal counsel; the state has thus taken his liberty without due process of law in its most basic sense. A new trial motion and appellate review may have been theoretically available to petitioner at one time. But on this record this Court cannot say that they were adequate remedies under the circumstances or that they afforded petitioner any realistic opportunity to be heard. If petitioner had no lawyer at any time following his conviction and was unable to obtain a lawyer he can hardly be held to have had a fair opportunity to litigate his constitutional claim. Cf. *Douglas* v. *California*, 372 U.S. 353. Whether that was the situation is a factual question which requires a hearing to resolve. But Nebraska has refused to make any inquiry of any sort. Even if it should turn out, as seems most unlikely, that petitioner had counsel in time to appeal, that remedy still would not have been adequate because his central claim of coercion rests on facts outside the trial record and thus could not have been reviewed by the state supreme court on appeal.[13]

Of course if upon a full hearing the Nebraska court found that petitioner did have an adequate opportunity at one time to assert his constitutional claim and that he deliberately waived his rights by not pursuing the remedy provided, further relief might be withheld, as is the situation

[13] Neb. Rev. Stat. § 25-1911 authorizes the supreme court to reverse, vacate or modify a district court judgment only "for errors appearing on the record."

on federal habeas corpus. *Fay* v. *Noia*, 372 U.S. 391. See *Henry* v. *Mississippi*, 379 U.S. 443, 451-52. But this determination in itself requires a judicial hearing, and there has not been any in this case. In the absence of such a determination, based on fully developed facts, Nebraska cannot constitutionally deny petitioner a hearing on his constitutional claim. For absent a determination that petitioner had and waived an adequate prior opportunity to be heard, the refusal of a hearing is in reality a refusal to allow the petitioner *any* opportunity to show that he is imprisoned in violation of the Constitution. That is the effect of Nebraska's refusal in this case, and that is what due process does not permit.

Paraphrasing the language quoted above from the *General Oil* opinion, it being the right of a state criminal defendant to be protected against a conviction obtained in violation of a constitutional right, it is manifest that a decision which denies such protection gives effect to the conviction. Thus the state's denial of protection for the constitutional right is itself a constitutional violation. It is a violation of the prisoner's right to corrective process, which is an aspect of the due process clause. A proposition similar to this was argued by counsel but not passed upon by the Court in *Smith* v. *Bennett*, 365 U.S. 708, 713 (see Brief for Petitioner, pp. 26-28).

The foregoing argument is a complete answer to any contention that the Nebraska judgment should stand because it can be said to rest on an independent state ground. This Court rejected a similar argument in *Young* v. *Ragen*, 337 U.S. 235, 238:

> Of course we do not review state decisions which rest upon adequate nonfederal grounds, and of course Illinois may choose the procedure it deems appropriate for the vindication of federal rights. *Loftus* v. *Illinois* [334 U.S. 804]. But it is not simply a question of state

> procedure when a state court of last resort closes the door to *any* consideration of a claim of denial of a federal right. And that is the effect of the denial of habeas corpus in a number of cases now before this Court . . .

That likewise is the effect of the denial of habeas corpus in this case. Accordingly, there is no constitutionally valid state ground on which the judgment can be supported.

C. *This Court Should Enforce the State's Constitutional Obligation to Furnish Corrective Process for Unconstitutional Imprisonment—the Appropriate Mandate.*

The difficulties reflected in some of the Court's opinions enunciating the states' duty to provide their prisoners with corrective process do not relate to the soundness or the existence of the duty. Those difficulties concern only the problem of its enforcement. Put in terms of right and remedy, a state prisoner's constitutional *right* to state corrective process is acknowledged, but his *remedy* for the vindication of that right has not been clear. The Court has been reluctant to enforce on the states this obligation. See, e.g., *Young* v. *Ragen*, 337 U.S. 235.

In the past when a state has defaulted outright in its remedial duty the Court has side-stepped enforcement by the expedient of making federal habeas corpus available. This can be seen in *Jennings* v. *Illinois*, 342 U.S. 104, and ultimately in the *Hawk* litigation. (Appendix B, *infra*.) The Court appeared on the verge of ordering implementation of the obligation in *Young* v. *Ragen*, *supra*, when it vacated denial of state habeas corpus, saying that "If there is now no post trial procedure by which federal rights may be vindicated in Illinois, we wish to be advised of that fact upon remand of this case" (337 U.S. at 239). But after re-

mand, the case did not return here. (See Appendix C, *infra*, for a recap of the exchange between this Court and the Illinois courts over the existence of a state post-conviction remedy.)

The fact that the Court has wisely refrained from insisting on full obedience by the states to this constitutional command does not mean that the Court should continue to do so. Indeed there are solid reasons why the Court should now, in the instant case, give effect to this long-recognized obligation. There is no serious question of the Court's power in this connection. See Note, Effect of the Federal Constitution in Requiring State Post-Conviction Remedies, 53 Colum. L. Rev. 1143 (1953).

Decisions this term and last indicate that the Court is already moving in this direction. *Jackson* v. *Denno*, 378 U.S. 368, in effect was a direction to the state to furnish adequate means for adjudicating the defendant's Fourteenth Amendment claim. The Court there held that the New York procedure for determining the voluntariness of a confession fell short of due process requirements; though the case came up on federal habeas corpus the Court remanded it with directions that the state be afforded the opportunity of holding a hearing on the confession issue, failing which the petitioner would be released without inquiry by the federal judge into the constitutionality of the confession. The release in that event would be for failure of state corrective process. See also *Boles* v. *Stevenson*, 379 U.S. 43. And in *Henry* v. *Mississippi*, 379 U.S. 443, rather than follow the policy of the past and send the state prisoner on to federal habeas corpus on the merits of his illegal search claim, the Court vacated the state judgment and remanded the case to the state court so that it could determine the question of waiver and itself decide the federal question as to the lawfulness of a search, if no

waiver were found. See *Rogers* v. *Richmond*, 365 U.S. 534, 547-49. It is but a short step from *Jackson* and *Henry* to requiring that state corrective process be effectively carried out in all respects.

1. Reasons Why the State's Obligation Should Be Enforced.

The Court's apparent reluctance in years past to compel state corrective process seems to have stemmed from an appropriate sensitivity to state procedural prerogatives within the federal system. State criminal administration after all is one of the major state concerns. The states properly exercise a large degree of autonomy in this field. The only federal interest is to see that certain procedural standards imposed by the Fourteenth Amendment are adhered to. The presuppositions of our federalism limit the national judiciary's intervention into the state criminal process to the minimum necessary to insure observance of these procedural safeguards; furthermore, such federal intervention as is necessary ought to be in the form that is least disruptive and abrasive to the states. It has been the Court's assumption, evidently, that sound federalism is better served, in the case of a state's breach of its obligation to furnish corrective process, by making federal corrective process available rather than by directing the state itself to meet its obligation. To this end, habeas corpus jurisdiction in the federal district courts has been defined broadly; the writ has been shaped to reach any constitutional violation in a state prosecution, in some circumstances despite state procedural obstacles. *Fay* v. *Noia*, 372 U.S. 391. The federal writ stands by, in other words, to cure any lack of state procedure for the vindication of federal claims.

But continued lack of adequate state procedure in many places has put a heavy load on the federal writ. This in

turn has brought about a mounting friction between the state and federal courts. This Court, as it recently said, "is not blind to the fact that the federal habeas corpus jurisdiction has been a source of irritation between the federal and state judiciaries." *Henry* v. *Mississippi*, 379 U.S. at 453. For well over a decade state judges and prosecuting officials have been voicing objections to federal habeas corpus. Since 1952 the Conference of Chief Justices has officially registered dissatisfaction. The Conference has expressed particular concern that a conviction affirmed by the highest court of a state, with review denied by this Court, could again be reviewed by a single federal trial judge and the conviction set aside long after it had otherwise become final.[14] Numerous proposals have been introduced in Congress to curtail or qualify this federal jurisdiction. Though none has yet been enacted into law, the House of Representatives has four times passed a bill of this sort.[15] Among the groups suggesting limitations, in addition to the state chief justices, have been the Judicial Conference of the United States[16] and the National Association of Attorneys General.[17] One prominent state judge has proposed the outright abolition of federal habeas corpus for convicted

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[14] This position was reiterated in a formal resolution in 1963. The Council of State Governments, Conference of Chief Justices, Aug., 1963, pp. 84-85.

[15] See H.R. Rep. No. 1384, 88th Cong., 2d Sess., 3-4 (1964). The latest bill passed by the House is H.R. 1835, 88th Cong., 2d Sess. (1964). The House debate on this bill is in 110 Cong. Rec. 14678-14684. (1964).

[16] Past and present proposals of the Judicial Conference are set out in 33 F.R.D. 365-390.

[17] In 1962 the state attorneys general adopted a resolution urging amendment to the federal habeas corpus statutes so as to give *res judicata* effect to state court determinations of fact. National Ass'n of Att'ys Gen., Conference Proceedings, 1962, p. 211.

state prisoners.[18] The situation has become intensified since the holding in *Fay* v. *Noia, supra,* that the adequate state ground of decision which forecloses direct review by this Court does not necessarily bar federal habeas corpus. As the Court noted in the *Henry* opinion, *supra,* in the federal district courts, in the one year from 1963 to 1964, the volume of habeas corpus petitions increased 85.5%.

This startling increase in federal collateral attacks on state convictions has resulted in large part from the state remedial vacuum which has left the federal district court as the only available forum for prisoners' due process claims. Coupled with the evolution in the coverage of the Fourteenth Amendment and in federal habeas corpus law, this has caused the federal judiciary to be pulled increasingly into state criminal administration. This experience shows that making federal corrective process available in case of state default—without at the same time requiring the state to provide such process in its own courts—no longer serves well the cause of harmonious federalism. Cf. *Mapp* v. *Ohio,* 367 U.S. 643, 651-53. A result has been achieved opposite from that intended by the policy of nonenforcement of the constitutional requirement.

Had the states developed effective post-conviction remedies the Court's continued deference might be a wise course. Though there is movement in the direction of broader procedures more hospitable to Fourteenth Amendment claims, a substantial number of states, like Nebraska, still retain highly restricted collateral avenues of attack on sentences. The Uniform Post Conviction Procedure Act,[19]

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[18] Desmond, Federal and State Habeas Corpus: How to Make Two Parallel Judicial Lines Meet, 49 A.B.A.J. 1166 (1963); Desmond, Federal Habeas Corpus Review of State Court Convictions—Proposals for Reform, 9 Utah L. Rev. 18 (1964).

[19] 9B Uniform Laws Ann. 352-59 (1957). For the Court's convenience, this Uniform Act is set out in full in Appendix D, *infra.*

first promulgated in 1955, has provided a model which, if adopted by a state, and broadly construed by its courts, would enable the state to adjudicate all federal claims, thereby reducing resort to the federal district court. But apparently only nine states have a procedure of this sort, or any variation of it.[20] Existing post conviction remedies can of course be broadened by judicial construction, and there are indications that this is being done in some states today.[21] But even so, many states retain remedies which in various ways restrict or prevent the post conviction hearing of numerous federal claims which can and must be heard by the federal district judge.[22] Accordingly, a large part of state criminal business today is channeled to the federal trial courts, to the dissatisfaction of many federal as well as state judges.[23]

This pattern can be altered if this Court will now direct the states to comply with the constitutional requirement of

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[20] Md. Ann. Code, art. 27 §§ 645-A to 645-J (Supp. 1964); N.C. Gen. Stat. §§ 15-217—15-222 (Supp. 1963); Ill. Rev. Stat. ch. 38, §§ 122-1—122-7 (1963); Ore. Rev. Stat. §§ 138.510—138.680 (1963); Maine Rev. Stat. Ann. ch. 126, § 1-A (Supp. 1963). Four states have apparently accomplished this by court rule: Alaska S.C. Rule 35(b); Del. Superior Court Rules of Crim. Proc., Rule 35; Mo. Rules of the Supreme Court, Rule 27.26; N.J. Crim. Practice Rules of Superior and County Courts, Rule 3:10 A-2. Arkansas adopted the Uniform Act in 1957 but repealed it two years later. 2 Act of Arkansas (1959) 1161.

[21] See cases cited at pages 14-15, *supra*.

[22] See Note, Federal Habeas Corpus for State Prisoners: The Isolation Principle, 39 N.Y.U. L. Rev. 78, 131-33 (1964); ABA, Section on Judicial Administration, Effective State Post-Conviction Procedures—Their Nature and Essentialities (Aug. 1958 Draft), pp. 4-20; Brennan, Federal Habeas Corpus and State Prisoners: An Exercise in Federalism, 7 Utah L. Rev. 423, 441 (1961); Reitz, Federal Habeas Corpus: Postconviction Remedy for State Prisoners, 108 U. of Pa. L. Rev. 461, 467-72 (1960).

[23] For a collection of federal judges' views see 33 F.R.D. 423-505. For the attitude of state judges see notes 14, 18, *supra*.

corrective process. A decision to that effect would almost certainly put this criminal litigation substantially back in the state courts where it belongs. And this, in turn, will do much to remove the irritant—real or imagined—of the federal district courts' participation in the state criminal field.

With the state furnishing the constitutionally required corrective process, the rule that federal habeas corpus cannot be invoked until state remedies have been exhausted (28 U.S.C. § 2254) would become more significant. A truly adequate state remedy would be much more apt to be available than at present because the state would be under an *enforceable* federal duty to provide it. The duty of course exists today, but it lacks teeth. This is not to say that a state remedy would never hereafter be found inadequate; there would no doubt still be instances of such, and the exhaustion statute, § 2254, provides for this. But to a far greater extent than at present, effective state corrective process would come into being. Troublesome questions about exhaustion would surely diminish in frequency and difficulty.

The truly important consequence of this Court's requiring the state to fulfill its obligation would be that many more state cases than at present would be finally determined in the state system. This is obviously a desideratum of federalism. Once the states began to open their courts to all claims of due process violations and began conducting full evidentiary hearings, the meritorious claims would, in the main, be recognized and relief be given. Those cases would thus never get into the federal judicial system at all. It is doubtful that in general state judges, any more than federal district judges, would reject on their merits well-founded due process claims when the issues and the full

facts finally come before the court for decision. The difficulties being encountered today, as shown by the instant case, stem from state procedure which frustrates getting claims before the courts on their merits. For prisoners denied relief on the merits a federal court would of course still be available—either this Court on certiorari or the district court on habeas corpus. Even in that event, however, the state proceeding as a practical matter would have a higher degree of finality than at present—and the burden on the federal judiciary will be reduced correspondingly.

Greater state finality will result because in most cases further evidentiary hearings on federal habeas corpus will be unnecessary. The state review of the federal claim—once the state fully assumes its obligation for corrective process—will involve a full evidentiary hearing, with a complete airing of the facts relevant to the constitutional question. If a record is kept and findings of fact made, the federal judge will then be able to exercise his discretion to decline to hear evidence. *Townsend* v. *Sain*, 372 U.S. 293, 312-13, 318-19. This would meet the complaint often heard that it is undesirable to have further *de novo* hearings on the facts in a federal court after a state conviction has become final. The power to hear evidence would remain in the federal court, but the occasions for its exercise would become less frequent. And of course it would still be open to the federal judge, as well as to this Court on direct review of the state proceeding, to hold that on the facts developed in the state hearing the state court erred in finding no constitutional violation. But that determination of law made on the record is a far less burdensome matter for federal judges and state prosecuting officials than the conducting of a full-dress evidential hearing in the federal district court.

More than this, however, adequate state post-conviction remedies would almost certainly reduce even the number of habeas corpus petitions filed in federal courts. This is shown dramatically by the Illinois experience. After it became apparent that there was really no effective post-conviction remedy in the Illinois courts, the Illinois legislature, in 1949, passed a Post-Conviction Hearing Act.[24] In the year before the Act, Illinois prisoners had filed 209 habeas corpus petitions in the federal district courts; the year after the Act's adoption these dropped to 61 petition.[25] This Court's enforcement of the requirement of corrective process could have a similar effect in many states.

However salutary this relief for the federal judiciary might be, the central objective is to put state criminal cases back into the state courts where they belong. State control over state criminal law is contemplated by the Constitution, subject to the procedural limitations of the Fourteenth Amendment. One of those limitations is that a state may not withhold from a prisoner all means of litigating an asserted violation of that Amendment. Nebraska, by the judgment in this case, has transgressed that Constitutional limitation in its criminal process. The judgment, accordingly, cannot stand. This Court shoud direct compliance with the constitutional requirement of corrective process. By so doing it will go far toward keeping Nebraska's criminal business in Nebraska's courts.

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[24] The present version is Ill. Rev. Stat. ch. 38, §§ 122-1 to 122-7 (1963). The background of the Act is traced in Jenner, The Illinois Post-Conviction Hearing Act, 9 F.R.D. 347 (1950). See also Appendix C, *infra*.

[25] ABA, Section on Judicial Administration, Effective State Post-Conviction Procedures—Their Nature and Essentialities (Aug. 1958 Draft), p. 37.

Surely it is not in the interest of federalism or state criminal justice or sound judicial administration for the Court again to go through experiences such as the seventeen-year *Hawk* litigation in Nebraska (Appendix B) or the "Illinois Merry-Go-Round" of unhappy memory (Appendix C). Only forthright enforcement of Nebraska's obligation in this case will insure against a repetition of those episodes. Time and experience show that this step, which the Court considered premature in the peculiar circumstances of *Woods* v. *Nierstheimer*, 328 U.S. 211, 216, must now be taken.

This step is clearly foreshadowed by the opinion earlier this term in *Henry* v. *Mississippi*, 379 U.S. 443. In that case the state court rested on a waiver of the federal objection to the use of certain police-obtained evidence. On the facts in the record before the Court the majority appeared unwilling to say that the waiver was ineffective. In that posture, the case could have been dismissed on the basis of an adequate state ground. The majority recognized, however, that an evidentiary hearing might show that the defendant, by relevant federal standards, had not forfeited his federal right by failing to assert it in accordance with state procedure. This meant that, following a dismissal by this Court, the issue could be litigated in the federal district court on habeas corpus and that the federal court would have to conduct an evidentiary hearing. But rather than relegate petitioner to the federal habeas corpus remedy the Court vacated the judgment and remanded this case to give the state court the opportunity to hold the hearing and make the pivotal determination. The majority said:

> By permitting the Mississippi Courts to make an initial determination of waiver, we serve the causes of efficient administration of criminal justice, and of harmonious federal-state judicial relations. Such a disposi-

> tion may make unnecessary the processing of the case through federal courts already laboring under congested dockets, or it may make unnecessary the relitigation in a federal forum of certain issues. (379 U.S. at 452-53.)

The same considerations call for a remand here to afford Nebraska the opportunity to adjudicate petitioner's claim, with the added injunction that Nebraska is not free under the Constitution to refuse adjudication altogether.

It was contemplated by the framers of the Constitution that the state courts would be appropriate—and perhaps the only—tribunals for adjudicating federal rights. The Constitution itself refrains from establishing inferior federal courts. This lack of constitutionally commanded courts, coupled with the Supremacy Clause, points plainly to a duty on the state judiciary, as a partner in the federal system to hear and decide federal as well as state claims.

2. The Appropriate Mandate

The Court should reverse or vacate the judgment of the Supreme Court of Nebraska and remand the case to that court for further proceedings not inconsistent with this Court's opinion. It must, of course, be made clear that due process requires a state to furnish corrective process in these circumstances and that on this record Nebraska appears not to have met this requirement.

On such a remand it would be open to the Nebraska Supreme Court to do any one of several things in compliance with the mandate:

(1) The Nebraska court could reconsider its position on the scope of habeas corpus, in light of this Court's decision, and hold that habeas corpus is now open to litigate peti-

tioner's constitutional claim.[26] Habeas corpus law is predominantly judge-made, and there is no insurmountable obstacle to the Nebraska court's saying that a violation of due process renders a sentence "void" and hence subject to collateral attack by this route.[27] If this course were taken, the state supreme court would then remand the case to the District Court for Lancaster County, where it originated, with directions that petitioner's claim be adjudicated, with a hearing on the evidence as to any disputed issues of fact.

(2) On the other hand, the Nebraska Supreme Court could stand by its position on habeas corpus but hold that coram nobis[28] or a declaratory judgment[29] is now available to petitioner. Coram nobis is a product of the common law, and the Nebraska judges are not necessarily bound by any fixed scope of that writ. They are free to hold that it is a remedy for this kind of due process defect in a trial. They are equally free to say that a declaratory judgment is the appropriate remedy. What procedure the state chooses to provide is no concern of this Court's. The state retains a wide choice of procedures, so long as there is *some effective procedure* actually provided. *Carter* v. *Illinois*, 329 U.S. 173, 176.

Whether it selects coram nobis or declaratory judgment —or something else—the state supreme court could remand

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[26] Courts in some states have been doing this in view of decisions by this Court. See cases cited at pages 14-15, *supra*.

[27] A sentence which is "void" or an "absolute nullity" is said to be subject to attack by habeas corpus in Nebraska. *Hawk* v. *O'Grady*, 137 Neb. 639, 641, 290 N.W. 911, 912 (1940); *In re Application of Dunn*, 150 Neb. 669, 675, 35 N.W.2d 673, 677 (1949).

[28] For Nebraska cases on coram nobis see pages 15-18. *supra*.

[29] Declaratory judgments are authorized by Neb. Rev. Stat. § 25-21,149 (see Appendix A).

the case to the District Court for Lancaster County for adjudication of petitioner's claim. That court could be directed to treat the petition in this case as an application for the remedy designated as appropriate. This kind of order is facilitated by a state statute abolishing the forms of action and establishing in their stead one form known as a civil action.[30] The Lancaster County district court imposed the sentence on petitioner in the first place and is accordingly the appropriate forum for coram nobis; there is nothing to suggest that it is inappropriate for a declaratory judgment, if that remedy be selected by the state supreme court. Any defect in parties respondent that might be thought to exist could be cured by a court-ordered amendment as provided for by statute.[31]

All of this is simply to point out that there are ways in which the Nebraska court can comply with a mandate from this Court requiring provision for corrective process. Any one of these appears to be open to the state supreme court without legislative action. Of course the legislature itself could respond by creating a new statutory remedy satisfying the state's constitutional obligation.[32]

At this stage of the litigation the Court need not pass on the steps to be taken if the Nebraska court should fail to comply with a mandate requiring corrective process for petitioner. It might be suggested, however, that the problem essentially is no different from actual or potential dis-

[30] Neb. Rev. Stat. § 25-101. Habeas corpus in Nebraska, as elsewhere, is considered a civil proceeding. *Selicow* v. *Dunn*, 100 Neb. 615, 616, 160 N.W. 991 (1916).

[31] Neb. Rev. Stat. § 25-852 reads: "The court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding, by adding or striking out the name of any party or by correcting a mistake in the name of the party, or a mistake in any other respect."

[32] See notes 19, 20, *supra*. A model is available in the Uniform Act set out in Appendix D, *infra*.

obedience of the mandate in many other cases remanded by this Court. If on the remand Nebraska failed to make corrective process available, petitioner could return here with a fresh petition for certiorari. This Court could then order petitioner's discharge from custody. That is the ultimate sanction behind the due process requirement of state corrective process. See *Dowd* v. *Cook*, 340 U.S. 206, 209-10.

Federal judicial enforcement of this requirement can be handled in the same manner as the enforcement of other due process requirements. When a federal district court, in a habeas corpus proceeding, holds that due process has been violated in a state prisoner's trial, it normally gives the state a choice: the state may re-try the accused or it may release him without more. The state, in other words, has the opportunity to remedy the due process violation by a new trial or other appropriate proceeding; if the opportunity is not taken, the prisoner must be discharged because he is held in violation of the Constitution. See *Boles* v. *Stevenson*, 379 U.S. 43. And so here. Nebraska should be given the opportunity to cure its due process violation of failure to provide corrective process. If it does not do so, then this Court, or the federal district court on a habeas corpus petition, should order petitioner released from the continued unconstitutional confinement by Nebraska—confinement in violation of petitioner's constitutional right to corrective process. *Jackson* v. *Denno*, 378 U.S. 368.

Since the hearing on the right-to-counsel claim will come in a collateral, postconviction proceeding, the remand here is not subject to the objection registered by some members of the Court to "fragmentizing" a state criminal trial. See *Henry* v. *Mississippi*, 379 U.S. at 454-55; *Jackson* v. *Denno*, 378 U.S. at 409-10.

III.

Since Nebraska Allows Habeas Corpus to Attack Convictions for Jurisdictional Defects Based on Nebraska Law, the Court Below Has Unconstitutionally Discriminated Against Federal Law by Refusing Habeas Corpus for Jurisdictional Defects Based on the Fourteenth Amendment.

Wholly apart from the enforcement of the state's obligation to provide corrective process, this case can be reversed on the alternative ground that the Nebraska court has unconstitutionally discriminated against federal law in the administration of its existing writ of habeas corpus. For if a state does provide judicial machinery for adjudicating a certain type of legal claim it cannot allow access to that machinery for claims arising under state law and at the same time deny access for similar claims arising under federal law. "A state may not discriminate against rights arising under federal laws." *McKnett* v. *St. Louis & S. F. Ry.*, 292 U.S. 230, 234. Nebraska does utilize the writ of habeas corpus for collateral inquiry into whether criminal convictions are null and void. However, the state refuses to hear claims that a conviction is void because of a violation of the Fourteenth Amendment. Only if the nullifying defect rests on state law will the Nebraska court inquire into it. (See Part II, A, of the Argument, *supra.*) This is a discrimination against federal law which the Constitution prohibits.

In the *McKnett* case, *supra,* Alabama had opened its courts to the litigation of tort claims arising out-of-state against foreign corporations. But Alabama sought to limit the claims which it would hear to those arising under the law of some state, thereby excluding the same kind of claim arising under the Federal Employers Liability Act. The Court held that this was an unconstitutional discrimination against federal law.

The historical background of this principle was carefully reviewed and the principle reaffirmed in *Testa* v. *Katt*, 330 U.S. 386. There an action was brought in a Rhode Island court under the Emergency Price Control Act—a federal statute—to recover treble damages for an overcharge. Though the state courts did entertain similar penal actions under Rhode Island law, the state supreme court held that it was contrary to the state's policy to entertain such actions arising under the laws of a government "foreign" in the "private international" sense. Viewing federal law that way, the state court refused to allow the action.

In reversing that decision, this Court pointed out that federal law is the prevailing policy in every state. By virtue of the Supremacy Clause of the Constitution[33] federal law cannot be contrary to state policy. Since "the Rhode Island courts have jurisdiction adequate and appropriate under established local law to adjudicate this action" the Court held that "the State courts are not free to refuse enforcement of petitioners' claim." (330 U. S. at 394.)

Habeas corpus in Nebraska is likewise "adequate and appropriate under established local law" to adjudicate petitioner's claim that the conviction under which he is held was obtained in violation of his constitutional right to counsel. The state has no "valid excuse" to refuse to litigate this claim. See *Testa* v. *Katt*, 330 U.S. at 392-93. The discussion of Nebraska habeas corpus earlier in this brief shows that the state makes the writ available where the convicting court lacked jurisdiction over the subject matter or the person or where it was without power to enter the

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[33] U.S. Constitution, Art. VI, para. 2: "This Constitution, and the laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding."

sentence. As otherwise stated by the Nebraska court, where the conviction or sentence is an "absolute nullity" or is "absolutely void" habeas corpus will lie. *Hawk* v. *O'Grady*, 137 Neb. 639, 641, 290 N.W. 911, 912 (1940); *In re Application of Dunn*, 150 Neb. 669, 675, 35 N.W.2d 673, 677 (1949). That the effect of an unconstitutional denial of counsel is to render a conviction void and an "absolute nullity" is made plain by the following portions of the opinion in *Johnson* v. *Zerbst*, 304 U.S. 458:

> Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty. . . . If the accused . . . is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or liberty. A court's jurisdiction at the beginning of trial may be lost "in the course of the proceedings" due to failure to complete the court—as the Sixth Amendment requires—by providing counsel for an accused who is unable to obtain counsel, who has not intelligently waived this constitutional guaranty, and whose life or liberty is at stake. If this requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed. The judgment of conviction pronounced by a court without jurisdiction is void . . . (304 U.S. at 467-68).

Though in *Johnson* v. *Zerbst* a federal conviction was being attacked under the Sixth Amendment, that is no basis for distinguishing it from the instant case, in light of *Gideon* v. *Wainwright*, 372 U.S. 335. For in *Gideon*

the right to counsel established for federal defendants by *Johnson* v. *Zerbst* was held to be vested likewise in state criminal defendants by the Fourteenth Amendment. As a result a state court, like a federal court, "no longer has jurisdiction to proceed" unless the guaranty of counsel is satisfied. If there is an unconstitutional deprivation of counsel, as petitioner's papers show here, then the state judgment is a "judgment of conviction pronounced by a court without jurisdiction," and it therefore "is void."

The refusal of Nebraska to adjudicate a right to counsel claim is thus a refusal to adjudicate a claim which goes to the jurisdiction of the convicting court and renders petitioner's sentence a nullity. Yet, at the same time, Nebraska hears other claims going to the jurisdiction of the court. The claims which it does hear stem from state law. The only jurisdictional claims it refuses to hear stem from the Federal Constitution. This is patently the kind of discrimination against federal law condemned by *McKnett* and *Testa*.[34]

To adjudicate petitioner's claim adequately would require an evidentiary hearing. Nebraska law contemplates that such a hearing can be conducted on habeas corpus. State statutes provide that the habeas corpus court may issue subpoenas for witnesses and may hold a hearing at which witnesses are examined.[35] There is nothing in Nebraska law to suggest that the state habeas corpus machinery is not wholly "adequate and appropriate . . . to adjudicate this action." Accordingly, "the State courts are not free to refuse enforcement of petitioners' claim." *Testa* v. *Katt*, 330 U.S. at 394.

---

[34] Apparently this argument has not previously been presented to the Court in a state habeas corpus case. See Note, Effect of the Federal Constitution in Requiring State Post-Conviction Remedies, 53 Colum. L. Rev. 1143, 1148 n. 27 (1953).

[35] Neb. Rev. Stat. §§ 29-2803, 29-2805.

In summary, with habeas corpus Nebraska has provided the machinery for corrective process, but it has defined its scope here in a way that excludes federal law claims which are essentially the same as the state law claims which the court does adjudicate. All that this Court need do, therefore, is to require Nebraska to treat petitioner's federal constitutional claim of want of jurisdiction the same as Nebraska treats state claims of want of jurisdiction under its existing habeas corpus procedure.

Conclusion

For all of the reasons set forth, the judgment below cannot stand. Petitioner has alleged facts showing prima facie a violation of his constitutional right to counsel, and he has been unconstitutionally denied a hearing on that claim by the Nebraska court. The judgment should be reversed, or vacated, and remanded with directions that by some procedure the petitioner's claim be adequately adjudicated.

Respectfully submitted,

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March, 1965

APPENDIX A

Nebraska Statutes

REVISED STATUTES OF NEBRASKA (1943):

§ 28-532.—*"Burglary," defined; penalty.* Whoever willfully, maliciously and forcibly breaks and enters into any dwelling house, kitchen, smokehouse, slaughterhouse, shop, office, storehouse, mill, pottery, factory, watercraft, schoolhouse, church or meeting house, barn, chicken house, stable, warehouse, malthouse, stillhouse, public building, or other private building, railroad car factory, station house, railroad car, public or private telephone pay station or booth, with intent to kill, rob, commit a rape, or commit any felony, or with intent to steal property of any value, shall be punished by imprisonment in the penitentiary not more than ten years nor less than one year, or by a fine not exceeding five hundred dollars, or imprisonment in the jail of the county not exceeding six months.

§ 29-2801.—*Habeas corpus; writ; when allowed.* If any person, except persons convicted of some crime or offense for which they stand committed, or persons committed for treason or felony, the punishment whereof is capital, plainly and specially expressed in the warrant of commitment, now is or shall be confined in any jail of this state, or shall be unlawfully deprived of his or her liberty, and shall make application, either by him or herself or by any person on his or her behalf, to any one of the judges of the district court, or to any county judge, and does at the same time produce to such judge a copy of the commitment or cause of detention of such person, or if the person so imprisoned or detained is imprisoned or detained without any legal authority, upon making the same appear to such judge, by oath or affirmation, it shall be his duty forthwith to allow a writ of habeas corpus, which writ shall be issued forthwith by the clerk of the district court, or by the county judge, as the case may require, under the seal of the court whereof the person allowing such writ is a judge, directed

to the proper officer, person or persons who detains such prisoner.

§ 25-1912 (1963 Supp.)—*Appeal to Supreme Court; civil and criminal actions; procedure; notice of appeal; docketing fee; filing of transcript.* The proceedings to obtain a reversal, vacation or modification of judgments and decrees rendered or final orders made by the district court, including judgments and sentences upon convictions for felonies and misdemeanors under the criminal code, shall be by filing in the office of the clerk of the district court in which such judgment, decree or final order was rendered, within one month after the rendition of such judgment or decree, or the making of such final order, or within one month from the overruling of a motion for a new trial in said cause, a notice of intention to prosecute such appeal signed by the appellant or appellants or his or their attorney of record, and, except as otherwise provided in section 29-2306, by depositing with the clerk of the district court the docket fee required by law in appeals to the Supreme Court. . . .

§ 29-2103.—*New trial; motion, when made; grounds, how assigned; newly discovered evidence.* The application for a new trial shall be by motion upon written grounds, and may be filed either within or without the term at which the verdict is rendered. It shall, except for the cause of newly discovered evidence material for the party applying, which he could not with reasonable diligence have discovered and produced at the trial, be filed within ten days after the verdict was rendered unless unavoidably prevented. In assigning the grounds for such motion, it shall be sufficient to assign the same in the language of the statute and without further or other particularity. In any criminal case where it shall be made to appear upon the motion of the defendant for a new trial, supported by affidavits, depositions or oral testimony, that the defendant has discovered new evidence material to his defense which he could not with reasonable diligence have discovered and produced during the term within which the verdict upon which he was sentenced was rendered, the district court may set aside such sentence and grant a new trial; *Provided*, that such motion is filed

within a reasonable time after the discovery of the new evidence; *and provided further,* that such motion must be filed within three years after the date of such verdict, and such motion and the procedure herein provided shall be the exclusive method and procedure for reviewing criminal cases after the expiration of the term at which such verdict is rendered.

§ 25-21,149.—*Declaratory judgments; courts of record; jurisdiction.* Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

APPENDIX B

Hawk's Quest for a Remedy

In 1936 Henry Hawk was convicted of murder and sentenced to life imprisonment by a Nebraska court. He later initiated proceedings contending that at his trial his constitutional right to the assistance of counsel had been violated. After five years of litigation this Court held, in 1945, that Hawk was entitled to a hearing on this claim. 326 U.S. 271. After seven more years, in 1952, Hawk was finally given a hearing on federal habeas corpus; he established his claim with proof and was ordered discharged. Pending an appeal by the state from that decision, Hawk died on April 21, 1953, thereby rendering the case moot seventeen years after the conviction.

All reported stages of this litigation are set out below.

Hawk v. *O'Grady*, 137 Neb. 639, 290 N.W. 911, *cert. denied*, 311 U.S. 645 (1940) (habeas corpus denied).

Hawk v. *Olson*, 130 F.2d 910 (8th Cir. 1942), *cert. denied*, 317 U.S. 697 (1943) (federal habeas corpus denied for failure to exhaust state remedies).

Ex Parte Hawk, 318 U.S. 746 (1943) (leave to file original petition for habeas corpus denied).

Ex Parte Hawk, 321 U.S. 114 (1944) (leave to file original petition for habeas corpus denied following denial without opinion in state supreme court, federal district court, and court of appeals).

Hawk v. *Olson*, 145 Neb. 306, 16 N.W.2d 191 (1944) (habeas corpus denied), *rev'd*, 326 U.S. 271 (1945) (habeas corpus petition stated a case for relief entitling petitioner to hearing).

Hawk v. *Olson*, 146 Neb. 875, 22 N.W.2d 136 (1946) (on remand, hearing denied; habeas corpus not proper in state court unless judgment absolutely void).

Hawk v. *Olson*, 66 F. Supp. 195 (D.C. Neb. 1946), *aff'd sub nom.*, *Hawk* v. *Jones*, 160 F.2d 807 (8th Cir.), *cert. denied*, 332 U.S. 779 (1947) (federal habeas corpus denied for failure to exhaust state remedy of coram nobis).

Hawk v. *State*, 151 Neb. 717, 39 N.W.2d 561 (1949), *cert. denied*, 339 U.S. 923 (1950) (coram nobis denied).

Hawk v. *Hann*, 103 F. Supp. 138 (D. Neb. 1952) (habeas corpus granted and release ordered).

Hann v. *Hawk*, 205 F.2d 839 (8th Cir. 1953) (vacated as moot because of Hawk's death; remanded with direction to dismiss), *rehearing denied*, 207 F.2d 82 (8th Cir. 1953).

APPENDIX C

The Illinois Merry-Go-Round*

White v. *Ragen*, 324 U.S. 760 (1945) (dismissed; habeas corpus wrong remedy)

Woods v. *Nierstheimer*, 328 U.S. 211 (1946) (dismissed; coram nobis possibly available)

Carter v. *Illinois*, 329 U.S. 173 (1946) (affirmed; scope of review on writ of error limited under state practice to "common law record" which did not include information bearing on deprivation of constitutional rights)

McLaren v. *Nierstheimer*, 329 U.S. 685 (1946) (reversed; state concession that habeas corpus is proper remedy and that hearing should be granted)

Foster v. *Illinois*, 332 U.S. 134 (1947) (affirmed; scope of review limited to common law record)

Marino v. *Ragen*, 332 U.S. 561 (1947) (reversed; state concession that habeas corpus is proper remedy and that hearing should be granted)

Bute v. *Illinois*, 333 U.S. 640 (1948) (affirmed; scope of review limited to common law record)

Loftus v. *Illinois*, 334 U.S. 804 (1948) (continued pending clarification whether state decision rested on erroneous choice of remedy or on federal question)

Loftus v. *Illinois*, 337 U.S. 935 (1949) (dismissed; writ of error appropriate, not habeas corpus)

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* *Marino* v. *Ragen*, 332 U.S. 561, 570 (Mr. Justice Rutledge dissenting). This series of cases is set forth and commented on in Hart & Wechsler, The Federal Courts and the Federal System 513-15 (1953), and in Jenner, the Illinois Post-Conviction Hearing Act, 9 F.R.D. 347 (1950).

Young v. *Ragen*, 337 U.S. 235 (1949) (remanded for consideration of availability of habeas corpus in light of *Loftus*)

Jennings v. *Illinois*, 342 U.S. 104 (1951) (vacated and remanded to determine scope of Post Conviction Hearing Act)

APPENDIX D

Uniform Post-Conviction Procedure Act (1955)

9B UNIFORM LAWS ANNOTATED 352

§ 1. [*Remedy—To Whom Available—Conditions*].—Any person convicted of a felony and incarcerated under sentence of [death or] imprisonment who claims that the sentence was imposed in violation of the Constitution of the United States or the Constitution or laws of this State, or that the court was without jurisdiction to impose the sentence, or that the sentence exceeds the maximum authorized by law, or that the sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under a writ of habeas corpus, writ of coram nobis, or other common law or statutory remedy, may institute a proceeding under this Act to set aside or correct the sentence, provided the alleged error has not been previously and finally litigated or waived in the proceedings resulting in the conviction or in any other proceeding that the petitioner has taken to secure relief from his conviction.

The remedy herein provided is not a substitute for nor does it affect any remedies which are incident to the proceedings in the trial court, or any remedy of direct review of the sentence or conviction but, except as otherwise provided in this Act, it comprehends and takes the place of all other common law and statutory remedies which have heretofore been available for challenging the validity of incarceration under sentence of [death or] imprisonment, and shall be used exclusively in lieu thereof. A petition for relief under this Act may be filed at any time.

§ 2. [*Exercise of Original Jurisdiction in Habeas Corpus*].—[[The Supreme Court, Circuit Court, District Court] in which, by the Constitution of this State, original jurisdiction in habeas corpus is vested, may in accordance with its rules, entertain a proceeding under this Act in an exercise of its original jurisdiction. In this event, the pro-

visions of this Act, to the extent applicable, shall govern the proceeding.]

§ 3. [*Commencement of Proceedings—Verification—Filing—Service*].—[Except in a proceeding brought under Section 2 of this Act,] the proceeding is commenced by filing a petition verified by the petitioner with the clerk of the court in which the conviction took place. Facts within the personal knowledge of the petitioner and the authenticity of all documents and exhibits included in or attached to the petition must be sworn to affirmatively as true and correct. The [Supreme Court, Court of Appeals] may by rule prescribe the form of verification. The clerk shall docket the petition upon its receipt and bring it promptly to the attention of the court and the [prosecuting attorney, county attorney, state's attorney, attorney general].

§ 4. [*Petition—Contents*].—The petition shall identify the proceedings in which the petitioner was convicted, give the date of the entry of the judgment and sentence complained of, specifically set forth the grounds upon which the petition is based, and clearly state the relief desired. All facts within the personal knowledge of the petitioner shall be set forth separately from other allegations of facts, and shall be verified as provided in section 3 of this Act. Affidavits, records, or other evidence supporting its allegations shall be attached to the petition or the petition shall state why they are not attached. The petition shall also identify any previous proceedings that the petitioner has taken to secure relief from his conviction. Argument, citations, and discussion of authorities shall be omitted from the petition.

§ 5. [*Proceeding as a Poor Person*].—The petition may allege that the petitioner is unable to pay the costs of the proceeding or to employ counsel. If the court is satisfied that the allegation is true, it shall order that the petitioner proceed as a poor person, and appoint counsel for him. If after judgment, a review is sought by the petitioner, and the hearing court is of the opinion that the review is requested in good faith, and finds that the petitioner is unable

to pay the costs of the review, the court shall order that all necessary costs and expenses incident thereto, including all court costs, stenographic services, printing, and reasonable compensation for legal services, be paid by [the county in which the judgment is rendered].

§ 6. [*Pleadings*].—Within [thirty (30)] days after the docketing of the petition, or within any further time the court may fix, the State shall respond by answer or motion. No further pleadings shall be filed except as the court may order. The court may grant leave, at any time prior to entry of judgment, to withdraw the petition. The court may make appropriate orders as to amendment of the petition or any other pleading, or as to pleading over, or filing further pleadings, or extending the time of the filing of any pleading other than the original petition.

§ 7. [*Hearing—Evidence—Order*].—[Except in a proceeding brought under Section 2 of this Act,] the petition shall be heard in the court in which the conviction took place and before any judge thereof. The court may receive proof by affidavits, depositions, oral testimony, or other evidence, and may order the petitioner brought before it for the hearing. If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence in the former proceedings, and any supplementary orders as to rearraignment, retrial, custody, bail, discharge, correction of sentence, or other matters that may be necessary and proper. The order making final disposition of the petition shall clearly state the grounds on which the case was determined and whether a federal or a state right was presented and decided. This order constitutes a final judgment for purposes of review.

§ 8. [*Waiver of Claims*].—All grounds for relief claimed by a petitioner under this Act must be raised in his original or amended petition, and any grounds not so raised are waived unless the court on hearing a subsequent petition finds grounds for relief asserted therein which could not reasonably have been raised in the original or amended petition.

§ 9. [*Review*].—A final judgment entered under this Act may be reviewed by the [Supreme] Court of this State on [appeal, writ of error] brought by either the petitioner or the state within [six (6) months] from the entry of the judgment.

§§ 10, 11, 12, 13, 14 omitted.

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In The

Supreme Court of the United States

October Term, 1964

No. 843

PAUL V. CASE, Petitioner,

V.

STATE OF NEBRASKA, Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

BRIEF FOR THE RESPONDENT

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INDEX

SUBJECT INDEX

	Page
Brief for the Respondent	
Constitutional and Statutory Provisions Involved	1
Question Presented	1
Argument	2
I. If the State Fails to Provide a Postconviction Remedy, Habeas Corpus in Federal Court is Available	2
II. The Sanction Contended for by Petitioner of Discharging the Petitioner Without an Evidentiary Hearing of His Factual Claims if the State Court Fails or Cannot Provide a Remedy Solves Absolutely Nothing	7
A. The Sanction Contended For By Petitioner Contravenes the Respect and Independence of the States	11
III. The Limited Jurisdiction Stated by the Nebraska Supreme Court in Habeas Corpus Does Not Differentiate Between Federal and State Rights	13
Conclusion	14
Appendix A	17
Legislative Bill 836, Legislature of Nebraska	17
Article I, Section 11, Constitution of the State of Nebraska	19

CITATIONS

Cases:

Brown v. Allen, 344 U. S. 443, 97 L. Ed. 469	3, 11
Carlsen v. State, 129 Neb. 84, 261 N. W. 339	8
Case v. State, 177 Neb. 404, 129 N. W. 2d 107	5, 14
Dowd v. U. S., 340 U. S. 206, 95 L. Ed. 215	10

Page

Fay v. Noia, 372 U. S. 391, 9 L. Ed. 2d 837 12
Gideon v. Wainright, 372 U. S. 335 ..... 6, 16
Hawk v. Olson, 326 U. S. 271, 90 L. Ed. 61 2
Hawk v. State, 151 Neb. 717, 39 N. W. 2d 561 8
Henry v. State of Mississippi, 379 U. S. 443, 85 S. Ct. 564 ..... 5, 7, 16
Jennings v. Illinois, 342 U. S. 104, 96 L. Ed. 119 ..... 4, 5, 7, 10
Johnson v. Zerbst, 304 U. S. 458 6
Phelps County v. City of Holdrege, 133 Neb. 139, 274 N. W. 483 9
Testa v. Katt, 330 U. S. 386 ..... 13, 14
Woods v. Nierstheimer, 328 U. S. 211 7
Young v. Ragen, 337 U. S. 235, 93 L. Ed. 1333 ..... 2, 3, 4

Constitutions:

Article I, Section 11, Constitution of the State of Nebraska 14, 19

Statutes:

United States Code, Title 28 § 2254 3
Nebraska Revised Statutes, 1943: § 25-21,149 8
Reissue Revised Statutes of Nebraska, 1943: Reissue of 1964, Chapter 25 9

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the statutes set forth by petitioner, other pertinent provisions are set forth in Appendix A.

QUESTION PRESENTED

1. Whether this court will require a state to provide some means whereby a prisoner can be heard on his claim that he is confined in violation of his consti-

tutional rights with the sanction of discharging the prisoner from custody without an evidentiary hearing if the state does not or is unable to comply.

ARGUMENT

I.

If the State Fails to Provide A Post-Conviction Remedy, Habeas Corpus in Federal Court Is Available.

In *Hawk* v. *Olson*, 326 U. S. 271, 90 L. Ed. 61, the Supreme Court of the United States reversed and remanded to the Supreme Court of Nebraska stating that the petitioner was entitled to an opportunity to prove his allegations of violations of the Fourteenth Amendment of the United States Constitution at his trial. The court did not state in what way the Nebraska court was to accomplish this, if it were, or what the enforcement would be from the United States Supreme Court; however, in the opinion this court did state:

> "* * * * *
>
> "* * *. When the state does not provide corrective judicial process, the Federal courts will entertain habeas corpus to redress the violation of the Federal constitutional right. White v. Ragen, 324 U.S. 760, 89 L. Ed. 932, 65 S. Ct. 978. * * *.
>
> "* * * * *"

This court long after *Young* v. *Ragen*, 337 U. S. 235, 93 L. Ed. 1333, has recognized that many states do not provide adequate postconviction remedies for claimed denial of federal constitutional rights; however, this court thus far has, even after *Young* v. *Ragen*, 337 U. S. 235, determined that this fact goes to the exhaustion of the petitioner's state remedies entitling him to

an earlier habeas corpus appearance in federal district court. Thus in *Brown* v. *Allen*, 344 U. S. 443, 97 L. Ed. 469, decided February 9, 1953, three and one-half years after *Young* v. *Ragen*, 337 U. S. 235, in discussing the question of exhaustion of state remedies, the court notes that in the legislative history of 28 U. S. C., Section 2254, that this problem was inherent in the amendment; the court stated at 344 U. S. 449:

"* * * * *

"When, in April 1948, Judge Maris presented the Judicial Conference draft of § 2254 to the Senate Judiciary Subcommittee, the language of the revision of 28 USC, on which the hearings were being held, set out three bases for exercise of federal jurisdiction over applications for habeas corpus from state prisoners. Under the language of the bill as it then read, an application might have been entertained where it appeared (1) that the applicant had exhausted the remedies available in the courts of the state, or (2) *where there was no adequate remedy available in such courts*, or (3) where such courts had denied the applicant a fair adjudication of the legality of his detention under the Constitution and laws of the United States. In accepting the recommendation of the Judicial Conference, the Congress eliminated the third basis of jurisdiction. S Rep No. 1559, p 9, shows the reason for this as follows:

" 'The second purpose is to eliminate, as a ground of Federal jurisdiction to review by habeas corpus judgments of State courts, the proposition that the State court has denied a prisoner a "fair adjudication of the legality of his detention under the Constitution and laws of the United States." The Judicial Conference believes that this would be an undesirable ground for Federal jurisdiction in addition to exhaustion of State remedies or lack of adequate remedy in the State courts because it

would permit proceedings in the Federal court on this ground before the petitioner had exhausted his State remedies. This ground would, of course, always be open to a petitioner to assert in the Federal court after he had exhausted his State remedies *or if he had no adequate State remedy.*

"'* * * * *.'" (Emphasis supplied.)

The majority further stated at 344 U. S. 458:

"* * * * *.

"* * *. So far as weight to be given the proceedings in the courts of the state is concerned, a United States district court, with its familiarity with state practice is in a favorable position to recognize adequate state grounds in denials of relief by state courts without opinion. A fortiori, where the state action was based on an adequate state ground, no further examination is required, *unless no state remedy for the deprivation of federal constitutional rights ever existed.* Mooney v. Holohan, 294 U. S. 103, 79 L. Ed. 791, 55 S. Ct. 340, 98 A.L.R. 406; Ex parte Hawk, 321 U. S. 114, 88 L. Ed. 572, 64 S. Ct. 448. * * *.

"* * * * *." (Emphasis supplied.)

A year and a half after *Young* v. *Ragen,* 337 U. S. 235, this court again considered the postconviction remedy situation in Illinois in *Jennings* v. *Illinois,* 342 U. S. 104, 96 L. Ed. 119, decided December 3, 1951. In the interim between the two cases Illinois passed the Illinois postconviction hearing act. In *Jennings* the petitioners claimed however that they were held in custody in violation of the federal Constitution and that even under the new act there was no state remedy presently available to them. This court, considered it appropriate that the Illinois Supreme Court be per-

mitted to provide the answer, on remand, whether petitioners' claims could be determined under the Illinois postconviction hearing act or whether or not that act did not provide an appropriate state remedy. Accordingly the court vacated the judgments below and held that if the Illinois Supreme Court determined that there was no Illinois remedy for determination of petitioners' claims that petitioners may proceed without more in the United States District Court.

There is no reason for the court to do otherwise in this case than it did in *Jennings* v. *Illinois*, 342 U. S. 104, except it may be doubted that any need exists for determination by the Nebraska Supreme Court that there is no remedy available since it is clear from the opinion below, *Case* v. *State*, 177 Neb. 404, 129 N. W. 2d 107, that there is no remedy available to petitioner under Nebraska law. (Except possibly by legislation now pending, Appendix A.) Petitioner however claims that *Jennings* v. *Illinois*, 342 U. S. 104, should no longer be followed because of the congestion in the federal courts and to reduce the friction in state and federal relations. There are undoubtedly a number of things which Congress could do to ease the court congestion problem and so far as the friction in federal-state relations, it is nothing now compared to what it would be should this court take the step petitioner asks of it.

The case of *Henry* v. *State of Mississippi*, 379 U. S. 443, 85 S. Ct. 564, decided January 18, 1965, cited by petitioner is clearly distinguishable from the present situation. That case was a direct review on certiorari to the Supreme Court of Mississippi in which this court remanded the case to the state court to determine the question of whether the petitioner had waived his right

to object to certain testimony. However, even in that case, the court specifically pointed out that in remanding the court did not even remotely imply that the state must forego its procedural requirements if it did not find there had been a waiver but on the contrary, that such a finding would only mean that the petitioner could then go into federal court. This, of course, as we have argued elsewhere in the brief, is the proper solution open to this petitioner who may go into federal court on his claim, he having exhausted his state's remedies, except that no remand to the state courts of Nebraska would be necessary in the instant case as it is demonstrated no remedy is presently available, unless the legislation pending in the Nebraska Legislature hereinafter referred to, fills this gap. (See Appendix A).

Petitioner also suggests that under *Johnson* v. *Zerbst*, 304 U. S. 458, and *Gideon* v. *Wainright*, 372 U. S. 335, a court loses its jurisdiction due to the failure to comply with the constitutional right to counsel; that since this goes to the jurisdiction of the court that it is actually within the pronouncements of the Nebraska court as to its remedy of habeas corpus and since this proposition has not been presented to the Nebraska court the petitioner apparently contends that this matter should be remanded to the Nebraska court for its reconsideration in the light of the proposition that the trial court lost jurisdiction if it denied the right to counsel thus making habeas corpus available. We feel that this consideration was undoubtedly considered by the Supreme Court of Nebraska in its treatment of the case below wherein it considered a number of this court's decisions relating to the right to counsel, including *Gideon* v. *Wainright*, 372 U. S. 335. Our pri-

mary objection to the petitioner's request in this regard, however, does not so much involve the remand as the sanction he suggests as discussed under point II; and as stated earlier we can see no valid or logical reason for not permitting the petitioner to go into federal court if the state fails or cannot give him a remedy even under this situation the same as was made available in *Henry* v. *Mississippi*, 379 U. S. 443, *Jennings* v. *Illinois*, 342 U. S. 104, *Woods* v. *Nierstheimer*, 328 U. S. 211, and numerous other cases.

II.

The Sanction Contended for by Petitioner of Discharging the Petitioner Wtihout an Evidentiary Hearing of His Factual Claims if the State Court Fails or Cannot Provide A Remedy Solves Absolutely Nothing.

What is petitioner actually asking this court to do? On page 38 of his brief he states that this court should reverse or vacate the judgment and remand the case to the Nebraska Supreme Court for further proceedings at which time the Nebraska court could reconsider its position on the scope of habeas corpus in the light of this court's decision. However, the Nebraska Supreme Court, in the case below, has clearly stated at 177 Neb. 404 at 414 that it has no jurisdiction in this case in a habeas corpus proceeding. It further made it clear that this jurisdiction rested upon the Legislature and not upon the court, stating:

"* * * * *

"The statute, section 29-2801, R. R. S. 1943, authorizing the writ of habeas corpus and the decisions of this court construing the jurisdiction of courts in such cases hitherto discussed remains unchanged. The Legislature has not seen fit by

amendment to enlarge the powers of the courts of this state with respect to such writs. Neither should this court do so by judicial legislation. Postconviction procedure is properly one for the Legislature to consider. * * *.

"* * * * *"

From this we can safely assume that the Nebraska Supreme Court has foreclosed itself from this route.

Petitioner than states that the Nebraska Supreme Court could change its position on coram nobis. However, the Nebraska Supreme Court has consistently held that the writ of error coram nobis exists only to bring into the record facts which were unknown to the defendant at the time of his trial through no lack of reasonable diligence. This certainly would not fit the facts of this case. The holdings of the Nebraska Supreme Court are so well established in this field that we may also safely assume that the court could not follow this procedure. *Carlsen* v. *State*, 129 Neb. 84, 261 N. W. 339, *Hawk* v. *State*, 151 Neb. 717, 39 N. W. 2d 561. Petitioner admits this in his brief commencing at page 15, point 2.

Lastly he suggests that the Nebraska court could grant relief under the declaratory judgment act, Nebraska Revised Statutes, 1943 Section 25-21,149. In this regard the Supreme Court of Nebraska has held, in an action for a declaratory judgment wherein the question had been litigated by the parties in a civil action in another court having jurisdiction from which there was no appeal that:

"* * * * *

"* * *. The act does not extend beyond the controversies to which it was intended to apply. An

examination of precedents in which its purposes have been discussed shows that courts have a reasonable discretion in determining the controversies to which it applies. It was not intended as a substitute for new trial or appeal; or as a method of destroying a proper exercise of power in a former action; or as authority for a second trial by the same parties on identical issues in different forums; or as justification for an unnecessary decision; *or as approval of collateral attacks on former adjudications.* * * *.

"* * * * *." (Emphasis supplied.) (*Phelps County* v. *City of Holdrege*, 133 Neb. 139, 274 N. W. 483.)

In this regard it should be mentioned that the declaratory judgment act is contained in Reissue Revised Statutes of Nebraska 1943, Reissue of 1964, Chapter 25, entitled "Courts, District; Civil Procedure." Again, petitioner concedes in his brief on page 19 that declaratory actions are not usually considered part of the criminal process in any jurisdiction and that it is certain that the Nebraska courts would not view a declaratory action as appropriate.

Petitioner then goes on to ask this court to require the Nebraska Supreme Court to follow one of the foregoing three remedies, each of which has clearly been foreclosed by the Nebraska Supreme Court and which petitioner concedes are unavailable; that if the Nebraska court should fail to comply with a mandate requiring corrective process, petitioner could return to this court on a fresh petition for certiorari at which time this court could order petitioner's discharge from custody. This, states petitioner, is the ultimate sanction behind the due process requirement of state cor-

rective process. *Dowd* v. *U. S.*, 340 U. S. 206, 95 L. Ed. 215, cited by petitioner, is no authority for the drastic sanction contended for by petitioner insomuch as in that case the federal district court had granted an evidentiary hearing and had found the petitioner's constitutional rights had been violated; the case was in this court following that finding, coming up on certiorari to the United States Court of Appeals.

The suggestion of petitioner solves nothing. He is in effect asking this court to require the Nebraska courts to hear petitioner's claim in any one of three ways, which he concedes the Nebraska courts have already foreclosed, or in the alternative to discharge the petitioner. Stated more succinctly he is asking this court to discharge the petitioner without any evidentiary hearing even in the federal district court since it is clear there is no procedure for an evidentiary hearing in the state courts.

So what petitioner is asking this court to do is to display its authority over the state courts or to punish the state courts for not having a remedy. This is clear from the sanction he requests, because discharging the petitioner without an evidentiary hearing fails completely to get at the root of the case—which is—was petitioner denied the right to counsel in violation of the Federal Constitution? Discharging the petitioner without a hearing on this question overlooks completely the reason for this case. It becomes clear then that the procedure followed by this court in *Jennings* v. *Illinois*, 342 U. S. 104, 96 L. Ed. 119, is the only logical way to get at the question—let him proceed directly to federal court because his state remedies have been exhausted. To ask this court to discharge petitioner

without an evidentiary hearing if the state court fails to provide on remand that which it is conceded by petitioner the state court cannot provide, is in reality asking for a show of authority or retribution on the state court—even if the latter were intended we question that the state court would be the principal sufferer.

A. The Sanction Contended For By Petitioner Contravenes The Respect And Independence Of The States.

The Honorable Mr. Justice Jackson concurring in *Brown* v. *Allen*, 344 U. S. 443, not only recognized that the states do not all grant postconviction remedies for matters which could have properly been raised on appeal but stated that the jurisdiction of the state in this regard should be respected by federal courts. Said Justice Jackson at 344 U. S. 541:

"* * * * *

"The states all allow some appeal from a judgment of conviction which permits review of any question of law, state or federal, raised upon the record. No state is obliged to furnish multiple remedies for the same grievance. Most states, and with good reason, will not suffer a collateral attack such as habeas corpus to be used as a substitute for or duplication of the appeal. *A state properly may deny habeas corpus to raise either state or federal issues that were or could have been considered on appeal. Such restriction by the state should be respected by federal courts.*

"* * * * *." (Emphasis supplied.)

The importance of recognizing the independence of the states in their legislative and judicial departments was recognized and again asserted in the recent land-

mark case of *Fay* v. *Noia*, 372 U. S. 391, 9 L. Ed. 2d 837, by the Honorable Mr. Justice Harlan with whom Mr. Justice Clark and Mr. Justice Stewart joined in dissenting. In discussing the determination of the adequacy and independence of state procedural grounds in refusing to consider a federal claim the Honorable Justice Harlan reviewed previous landmark decisions of this court stating at page 466 of 372 U. S.:

"* * * * *

"But determination of the adequacy and independence of the state ground, I submit, marks the constitutional limit of our power in this sphere. The reason why this is so was perhaps most articulately expressed in a different but closely related context by Mr. Justice Field in his opinion in Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 401, 37 L. Ed. 772, 786, 13 S. Ct. 914. He stated, in a passage quoted with approval by the Court in the historic decision in Erie R. Co. v. Tompkins, 304 U. S. 64, 78, 79, 82 L. Ed. 1188, 1194, 58 S. Ct. 817, 114 A. L. R. 1487:

"'[T]he Constitution of the United States . . . recognizes and preserves the autonomy and independence of the States—independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a denial of its independence.'

"For this Court to go beyond the adequacy of the state ground and to review and determine the correctness of that ground on its merits would, in our hypothetical case, be to assume full control

> over a State's procedures for the administration of its own criminal justice. This is and must be beyond our power if the federal system is to exist in substance as well as form. The right of the State to regulate its own procedures governing the conduct of litigants in its courts, and its interest in supervision of those procedures, stand on the same constitutional plane as its right and interest in framing 'substantive' laws governing other aspects of the conduct of those within its borders.
>
> "* * * * *"

A similar interest of the state is clearly present in the situation here presented where the state has a strong legitimate interest in the finality of its judgments and wherein the Legislature of the people had not at the time of this decision authorized the courts to take jurisdiction of claimed invasions which could have been raised at the trial, on motion for new trial, or on appeal.

The sanction contended for by petitioner not only disregards this basic independence of the states, but also completely ignores the ultimate issues presented by his original petition.

III.

The Limited Jurisdiction Stated By the Nebraska Supreme Court in Habeas Corpus Does Not Differentiate Between Federal and State Rights.

Even in *Testa* v. *Katt*, 330 U. S. 386, before holding that the state court must enforce a valid federal claim, this court looked to the local law of Rhode Island to determine if the court had adequate jurisdiction to handle such cases, 330 U. S. at 394. The court there

found that Rhode Island was able to adjudicate similar state claims and therefore could not discriminate against the federal claim. However, such is not the case here as demonstrated by the limited jurisdiction in habeas corpus in Nebraska. Article I, Section 11 of the Constitution of the State of Nebraska provides in part as follows:

> "In all criminal prosecutions the accused shall have the right to appear and defend in person or by counsel, to demand the nature and cause of accusation, and to have a copy thereof; * * *."

It is clear from the opinion of the court below, *Case* v. *State,* 177 Neb. 404 at 412, and previous opinions of the State Supreme Court discussing the jurisdiction in habeas corpus in Nebraska that a denial of this provision of the State Constitution would not be available in Nebraska in habeas corpus; there is thus no discrimination between the state and federal law in this regard, habeas corpus simply does not apply when the trial court had jurisdiction of the offense and of the person charged and the sentence was within the power of the court. This, as alluded to earlier, is far different from the situation in *Testa* v. *Katt,* 330 U.S. 386, in which the state court had adequate and appropriate jurisdiction under local law to adjudicate the same type of action as was presented in the federal law.

CONCLUSION

We feel that it would be a waste of this court's time to discuss further the cases cited by petitioner in an attempt to draw distinctions which would be of doubtful value since this court undoubtedly has the power to do what petitioner requests should it decide to do so.

The real question in the case comes down to whether or not this court will require the states to enlarge their jurisdiction in regard to postconviction remedy on threat of discharge of a petitioner without an evidentiary hearing. This is a broad issue involving future ramifications in state-federal relations; it is a step down a definite path which requires philosophical considerations perhaps more than legal ones. It undoubtedly involves a step which, once taken, may become a touchstone for further curtailment of state independence by future courts.

The State of Nebraska as well as other states have a legitimate interest in determining that at some point a judgment of conviction must reach finality. The people of Nebraska through its elected Legislature has up until the time of this case decided that this point in time should be when the time for appeal has become final, except in the limited cases available in habeas corpus and coram nobis discussed herein.

Congress on the other hand has decided that habeas corpus should still be allowed in a broader spectrum even after the time for appeal has passed, but in the federal court system. This is its prerogative and protects the rights of a petitioner.

But the jurisdiction of the state courts, in keeping with the philosophy of our republic, should be established by the people of the state and not by the Congress or the United States courts.

What is cause and what is effect is often a debatable question. The congestion of habeas corpus cases in the federal courts is undoubtedly the result in part of

states not providing a suitable remedy; but this congestion could not have taken place if Congress had not provided the remedy in the first instance. Since Congress has properly seen fit to provide habeas corpus in the federal court system it may also properly take a number of steps to alleviate the congestion problem.

There is absolutely nothing to be gained in adopting the sanction petitioner suggests if the Nebraska courts are unable to provide a remedy, either by re-examination of habeas corpus in the light of *Gideon* v. *Wainright*, 372 U. S. 335, or by use of the postconviction remedy legislation now pending. Petitioner should, in such case, as in the many cases in the past including the recent case of *Henry* v. *Mississippi*, 379 U. S. 443, be then entitled to go to federal district court for an evidentiary hearing; instead of destroying federal-state relations by the sanction petitioner suggests, this procedure, in the words of the majority in *Henry* v. *Mississippi*, 379 U. S. 443, 85 S. Ct. 564 at 570, would "serve the causes of efficient administration of criminal justice, and of harmonious federal-state judicial relations."

Respectfully submitted,

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APPENDIX A

Legislative Bill 836 is in the final stages of passing through Nebraska's Unicameral Legislature, it having been voted on favorable twice by the entire legislative body at the time of printing of this brief. The text of this bill is at this time as follows:

A BILL

FOR AN ACT relating to criminal procedure; to provide a postconviction procedure; to provide that the procedure shall be cumulative; to provide for appointment of attorneys as prescribed; and to declare an emergency.

Be it enacted by the people of the State of Nebraska,

Section 1. A prisoner in custody under sentence and claiming a right to be released on the ground that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States, may file a verified motion at any time in the court which imposed such sentence, stating the grounds relied upon and asking the court to vacate or set aside the sentence.

Unless the motion and the files and records of the case show to the satisfaction of the court that the prisoner is entitled to no relief, the court shall cause notice thereof to be served on the county attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States,

the court shall vacate and set aside the judgment and shall discharge the prisoner or resentence him or grant a new trial as may appear appropriate. Proceedings under the provisions of this act shall be civil in nature. Costs shall be taxed as in habeas corpus cases.

A court may entertain and determine such motion without requiring the production of the prisoner, whether or not a hearing is held. Testimony of the prisoner or other witnesses may be offered by deposition. The court need not entertain a second motion or successive motions for similar relief on behalf of the same prisoner.

Sec. 2. An order sustaining or overruling a motion filed under the provisions of this act shall be deemed to be a final judgment, and an appeal may be taken to the Supreme Court therefrom as provided for in appeals in civil cases; *Provided*, that a prisoner may in the discretion of the Supreme Court upon application to the court be released on such recognizance as the Supreme Court shall fix pending the determination of the appeal.

Sec. 3. The remedy provided by this act is cumulative and is not intended to be concurrent with any other remedy existing in the courts of this state. Any proceeding filed under the provisions of this act which states facts which is true would constitute grounds for relief under another remedy shall be dismissed without prejudice.

Sec. 4. The district court may appoint an attorney or attorneys, not exceeding two, to represent the prisoners in all proceedings under the provisions of this act and fix their compensation as provided in section 29-1803, Reissue Revised Statutes of Nebraska, 1943.

Sec. 5. Since an emergency exists, this act shall be in full force and take effect, from and after its passage and approval, according to law.

(Legislative Journal, Nebraska Legislature, Sixty-fourth Day, April 2, 1965, p. 1032.)

Article I, Section 11, Nebraska Constitution provides as follows:

> Rights of accused. In all criminal prosecutions the accused shall have the right to appear and defend in person or by counsel, to demand the nature and cause of accusation, and to have a copy thereof; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf; and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed.

SUPREME COURT OF THE UNITED STATES

No. 843.—October Term, 1964.

Paul V. Case, Petitioner,
v.
State of Nebraska.

On Writ of Certiorari to the Supreme Court of Nebraska.

[May 24, 1965.]

Per Curiam.

Petitioner sought a writ of habeas corpus in the District Court for Lancaster County, Nebraska, alleging that he was unconstitutionally denied the assistance of counsel when he entered a plea of guilty in that court to a charge of burglary. The trial court dismissed the petition without a hearing, and filed no opinion. The Nebraska Supreme Court affirmed. 177 Neb. 404, 129 N. W. 2d 107. The Supreme Court's opinion recognized that petitioner's allegations, if true, would establish a violation of the Federal Constitution. 177 Neb., at 410, 129 N. W. 2d, at 111. The Supreme Court held, however, that, in Nebraska, "Habeas corpus is not available to discharge a prisoner from a sentence of penal servitude if the court imposing it had jurisdiction of the offense and of the person charged with the crime, and the sentence was within the power of the court." 177 Neb., at 412, 129 N. W. 2d, at 112. We granted certiorari, 379 U. S. 958, to decide whether the Fourteenth Amendment requires that the States afford state prisoners some adequate corrective process for the hearing and determination of claims of violation of federal constitutional guarantees.

After certiorari was granted, the Nebraska legislature enacted a statute providing a postconviction procedure. Neb. Leg. Bill 836, Seventy-fifth Session, effective April 12, 1965. On its face, the statute provides for a hearing

of petitions such as this one, alleging denial of federal constitutional rights. Therefore, the judgment is vacated and the cause remanded to the Nebraska Supreme Court for reconsideration in light of the supervening statute.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 843.—October Term, 1964.

Paul V. Case, Petitioner,
v.
State of Nebraska.
} On Writ of Certiorari to the Supreme Court of Nebraska.

[May 24, 1965.]

Mr. Justice Clark, concurring.

As the Court points out, we granted certiorari in this case "to decide whether the Fourteenth Amendment requires that the States afford state prisoners some adequate corrective process for the hearing and determination of claims of violation of federal constitutional guarantees." Happily, Nebraska in the interim has adopted just such a procedure thus obviating the necessity of our passing upon the question.

It should be pointed out, however, that as early as 1949 this Court in *Young* v. *Ragen*, 337 U. S. 235, articulated the principle that the State must afford prisoners some "clearly defined method by which they may raise claims of denial of federal rights." 337 U. S. 235, 239. But compare *Mooney* v. *Holohan*, 294 U. S. 103 (1935). In stating that proposition the Court noted: "The doctrine of exhaustion of state remedies, to which this Court has required the scrupulous adherence of all federal courts . . . presupposes that some adequate state remedy exists. We recognize the difficulties with which the Illinois Supreme Court is faced in adapting available state procedures to [this] requirement . . . . Nevertheless, that requirement must be met." *Id.*, at 238–239.

Thereafter, the Illinois Post Conviction Hearing Act was adopted.[1] It was followed by passage of a statute in North Carolina in 1951 which was "modeled" on the Illinois Act.[2] *Miller* v. *State*, 237 N. C. 29, 51, 74 S. E.

[1] Ill. Rev. Stat., c. 38, §§ 122–1—122–7 (1963).

[2] N. C. Gen. Stat. §§ 15–217—15–222 (Supp. 1963).

2d 513, 528 (1953). Nebraska is the sixth State to adopt such a statute since *Young v. Ragen, supra.*[3] There exists in some States a wide variety of procedural techniques that have been used to deal with due process attacks on criminal convictions, *i. e.*, basic common-law remedies such as habeas corpus, *coram nobis* and delayed motions for new trial. But the great variations in the scope and availability of such remedies result in their being entirely inadequate.

As a consequence there has been a tremendous increase in habeas corpus applications in federal courts. Indeed, in the Supreme Court alone they have increased threefold in the last 15 years. This has brought about much public agitation and debate over proposed limitations of the habeas corpus jurisdiction of federal courts. The necessity for such proposals has been based on various grounds, including that of federal-state comity; inordinate delay in the administration of criminal justice in the state courts; and the heavy burden on the federal judiciary. None of these will survive careful scrutiny.

Strangely enough there has been little light thrown on the necessity for more effective post-conviction remedies in the States. In 1958 the Burton Committee [4] reported out a preliminary draft of findings in which it stated

> "that the law of state post-conviction process in many states was wholly inadequate to cope with the de-

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[3] Maryland, Maine and Oregon have passed similar legislation. Md. Ann. Code, Art. 27, §§ 645–A to 645–J (Supp. 1964); Me. Rev. Stat. Ann., c. 126, § 1–A (Supp. 1963); Ore. Rev. Stat. §§ 138.510–138.680 (1963). It should be noted, however, that four other States have adopted similar procedures by Rule of Court. See Alaska Sup. Ct. Rule 35 (b); Del. Super. Ct. (Crim. Proc.) Rule 35; Mo. Sup. Ct. Rule 27.26; N. J. Crim. Prac. Rules of Super. and County Cts., Rule 3:10 A–2.

[4] The late Mr. Justice Burton of revered memory was Chairman of the Committee on Post Conviction Remedies of the American Bar Association's Section of Judicial Administration. In August 1958 it

mands now being placed upon it. In some jurisdictions prisoners were altogether precluded from direct access to the courts. [*Cochran* v. *Kansas*, 316 U. S. 255 (1942); *Dowd* v. *Cook*, 340 U. S. 206 (1951).] . . . In many more, the procedures recognized by state law failed to provide genuine opportunities for testing constitutional issues of the most numerous and important types. The result was that prisoners often failed to obtain hearings on their allegations in the state courts. This, in turn, increased the number of petitions in state and federal courts and was generally productive of frustrations in all persons concerned with the process." At pp. 2–3.

Believing that the practical answer to the problem is the enactment by the several States of post-conviction remedy statutes I applaud the action of Nebraska. This will enable prisoners to "air out" their claims in the state courts and will stop the rising conflict presently being generated between federal and state courts. This has proven true in Illinois where it is reported that federal applications from state prisoners dropped considerably after its Act was adopted. I understand that the Illinois Legislature is now considering the enlargement of the five-year limitations period of its present Act to a 20-year period. The consensus is that this will solve the problem entirely in Illinois, which was originally the "sore spot" of the Nation in this regard.

I hope that the various States will follow the lead of Illinois, Nebraska, Maryland, North Carolina, Maine and Oregon in providing this modern procedure for testing federal claims in the state courts and thus relieve the federal courts of this ever-increasing burden.

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circulated a preliminary draft of a study entitled Effective State Post-Conviction Procedures—Their Nature and Essentialities, which was prepared by the Seminar in Criminal Procedure of the University of Chicago Law School under the direction of Professor Francis A. Allen.

SUPREME COURT OF THE UNITED STATES

No. 843.—October Term, 1964.

Paul V. Case, Petitioner,
v.
State of Nebraska.
} On Writ of Certiorari to the Supreme Court of Nebraska.

[May 24, 1965.]

Mr. Justice Brennan, concurring.

The petitioner entered his plea of guilty on April 18, 1963, one month after this Court's decision in *Gideon* v. *Wainwright*, 372 U. S. 335, holding the Sixth Amendment guarantee of counsel applicable to state prosecutions by virtue of the Fourteenth Amendment.[1] The Nebraska Supreme Court followed prior Nebraska decisions in holding that, in a habeas corpus action brought by a convicted prisoner, judicial inquiry is limited to the jurisdiction of the convicting court over the offense and over the person of the accused, and to the question whether the sentence

[1] The petition for habeas corpus reads:

"Petitioner, Paul Vernon CASE, was sentenced to five (5) years in the Nebraska Penal and Correctional Complex on May 3, 1963, A. D.

"Petitioner was 'fast talked' and forcibly coerced into waiving his rights (U. S. Constitutional Rights) to have advice and counsel; to have a Preliminary Hearing, and to plead not-guilty.

"Mr. William D. Blue told Petitioner he, Petitioner, would be charged with being 'An Habitual Criminal' if he did not waive these rights. He, Petitioner was held in Solitary Confinement in City Jail, until such time as he would agree—under cruel and unusual circumstances.

"The basic rights waived by this Petitioner are guaranteed him under the Sixth Amendment of the U. S. Constitution and are so fundamental and essential to a fair trial that they are made obligatory upon the States, *All* states, by way of the Fourteenth Amendment. For reference see Gideon vs. Wainwright in the U. S. Supreme Court. October 1962, Term, No. 155; all Justices concurring."

imposed was within the power of the court.[2] The State conceded in its response to the petition for certiorari that habeas corpus was unavailable to hear petitioner's claim and that petitioner had no other remedy in the state courts.[3]

On oral argument, counsel appointed for petitioner, see 379 U. S. 995, conceded the relevancy of the new Nebraska postconviction procedure,[4] but contended that petitioner

[2] See *Jackson* v. *Olson*, 146 Neb. 885, 893–894, 22 N. W. 2d 124, 129–130; *In re Application of Dunn*, 150 Neb. 669, 35 N. W. 2d 673; *Hawk* v. *Olson*, 145 Neb. 306, 16 N. W. 2d 181, rev'd 326 U. S. 271, on remand, 146 Neb. 875, 22 N. W. 2d 136.

[3] The response stated: "For all practical purposes, there is no collateral remedy available in the Nebraska courts to a state prisoner who alleges that a violation of his federal constitutional rights occurred in connection with his conviction and whose claim has not yet been considered by the state courts, unless the prisoner's claim is predicated upon a lack of jurisdiction of the sentencing court over the offense or over the person of the accused."

In addition to this concession that the State provided no remedy whatever, petitioner cites *Carlsen* v. *State*, 129 Neb. 84, 261 N. W. 339, as authority for the unavailability of *coram nobis*; Neb. Rev. Stat. § 29–2103 (1964 Reissue), as barring a motion for a new trial; and Neb. Rev. Stat. § 25–1912 (1964 Reissue), as barring an appeal.

[4] The new statute, Neb. Leg. Bill 836, 75th Session, effective April 12, 1965, provides:

"Section 1. A prisoner in custody under sentence and claiming a right to be released on the ground that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States, may file a verified motion at any time in the court which imposed such sentence, stating the grounds relied upon, and asking the court to vacate or set aside the sentence.

"Unless the motion and the files and records of the case show to the satisfaction of the court that the prisoner is entitled to no relief, the court shall cause notice thereof to be served on the county attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that there was such a denial or infringement of the ri s of the prisoner as to render the judgment void or voidable

was nevertheless entitled to a declaration that he had been unconstitutionally denied a hearing by the Nebraska courts, and to a reversal of the judgment of the Nebraska Supreme Court and a mandate directing that by some procedure the petitioner's claim be adequately adjudicated.[5]

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under the Constitution of this state or the Constitution of the United States, the court shall vacate and set aside the judgment and shall discharge the prisoner or resentence him or grant a new trial as may appear appropriate. Proceedings under the provisions of this act shall be civil in nature. Costs shall be taxed as in habeas corpus cases.

"A court may entertain and determine such motion without requiring the production of the prisoner, whether or not a hearing is held. Testimony of the prisoner or other witnesses may be offered by deposition. The court need not entertain a second motion or successive motions for similar relief on behalf of the same prisoner.

"Sec. 2. An order sustaining or overruling a motion filed under the provisions of this act shall be deemed to be a final judgment, and an appeal may be taken to the Supreme Court therefrom as provided for in appeals in civil cases; *Provided*, that a prisoner may in the discretion of the Supreme Court upon application to the court be released on such recognizance as the Supreme Court shall fix pending the determination of the appeal.

"Sec. 3. The remedy provided by this act is cumulative and is not intended to be concurrent with any other remedy existing in the courts of this state. Any proceeding filed under the provisions of this act which states facts which if true would constitute grounds for relief under another remedy shall be dismissed without prejudice.

"Sec. 4. The district court may appoint an attorney or attorneys, not exceeding two, to represent the prisoners in all proceedings under the provisions of this act and fix their compensation as provided in section 29–1803, Reissue Revised Statutes of Nebraska, 1943."

[5] The petitioner states in his brief:

"At this stage of the litigation the Court need not pass on the steps to be taken if the Nebraska court should fail to comply with a mandate requiring corrective process for petitioner. It might be suggested, however, that the problem essentially is no different from actual or potential disobedience of the mandate in many other cases remanded by this Court. If on the remand Nebraska failed to make

Petitioner concedes that the Court's practice has been to remit prisoners to their federal habeas remedy. See, *e. g.*, *Jennings* v. *Illinois*, 342 U. S. 104. But he contends that substituting federal for state corrective process, instead of directing the State itself to meet its obligation, is a disservice to sound principles of federalism.[6] He points

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corrective process available, petitioner could return here with a fresh petition for certiorari. This Court could then order petitioner's discharge from custody. That is the ultimate sanction behind the due process requirement of state corrective process. See *Dowd* v. *Cook*, 340 U. S. 206, 209–10."

In support of this contention, the petitioner argues that the Supremacy Clause and the fundamental Fourteenth Amendment right to a hearing constitutionally require the States to afford corrective judicial process to remedy federal constitutional defects in their criminal prosecutions, citing *Frank* v. *Mangum*, 237 U. S. 309, 335; *Moore* v. *Dempsey*, 261 U. S. 86, 91; *Mooney* v. *Holohan*, 294 U. S. 103, 113; *New York ex rel. Whitman* v. *Wilson*, 318 U. S. 688, 690; *Carter* v. *Illinois*, 329 U. S. 173, 175–176; *Foster* v. *Illinois*, 332 U. S. 134, 139; *Taylor* v. *Alabama*, 335 U. S. 252, 272 (concurring opinion); *Young* v. *Ragen*, 337 U. S. 235, 238–239. In addition to the cases cited involving criminal convictions, petitioner cites as other applications of the general principle *General Oil Co.* v. *Crain*, 209 U. S. 211, 228; *Kenney* v. *Supreme Lodge*, 252 U. S. 411, 415; *Ward* v. *Love County*, 253 U. S. 17; *McKnett* v. *St. Louis & S. F. R. Co.*, 292 U. S. 230; *Testa* v. *Katt*, 330 U. S. 386. He also argues that, since Nebraska allowed habeas corpus to attack convictions for jurisdictional defects based on Nebraska law, the Nebraska Supreme Court unconstitutionally discriminated against federal law by refusing habeas corpus for jurisdictional defects based on the Fourteenth Amendment. For the proposition that a State may not discriminate against rights arising under federal laws, petitioner cites *McKnett* v. *St. Louis & S. F. R. Co.*, *supra*, and *Testa* v. *Katt*, *supra*, and for the proposition that an unconstitutional denial of counsel is a jurisdictional defect relies on *Johnson* v. *Zerbst*, 304 U. S. 458.

[6] Petitioner refers to *Young* v. *Ragen*, *supra*, where, in vacating the denial of state habeas corpus, the Court said: "If there is now no post-trial procedure by which federal rights may be vindicated in Illinois, we wish to be advised of that fact upon remand of this case." 337 U. S., at 239. He also cites *Jackson* v. *Denno*, 378 U. S. 368;

to the vast increase in the number of federal habeas applications by state prisoners as evidence that lack of adequate state procedures has put an intolerable strain on the federal writ and has brought about mounting friction between state and federal courts. See *Henry* v. *Mississippi*, *supra*, 379 U. S., at 453. In short, he contends that if the evolution in the coverage of the Fourteenth Amendment and in the scope of federal habeas corpus, see *Fay* v. *Noia*, 372 U. S. 391; is not to pull the federal judiciary increasingly into state criminal administration, the States must provide broader procedures more hospitable to federal constitutional claims.

The desirability of minimizing the necessity for resort by state prisoners to federal habeas corpus is not to be denied. Our federal system entrusts the States with primary responsibility for the administration of their criminal laws. The Fourteenth Amendment and the Supremacy Clause make requirements of fair and just procedures an integral part of those laws, and state procedures should ideally include adequate administration of these guarantees as well.[7] If, by effective corrective processes,

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Boles v. *Stevenson*, 379 U. S. 43; *Henry* v. *Mississippi*, 379 U. S. 443; and Note, Effect of the Federal Constitution in Requiring State Post-Conviction Remedies, 53 Col. L. Rev. 1143 (1953).

[7] Dean Griswold of the Harvard Law School, in an address, "The States and Criminal Law," given on May 13, 1965, to the Cleveland Bar Association, said:

"For, after all, the basic responsibility for the enforcement of the criminal law remains with the States. The States are, or should be, as much concerned with high standards as is the Federal government. The States should, in my view, welcome the determinations of the Supreme Court that the high standards prescribed by our Federal Constitution are to be taken seriously and should be enforced. What is needed now is for the States to accept this responsibility, and to adopt means to carry it out. With proper explanation and understanding, this can, I believe, be done without impairing our enforce-

the States assumed this burden, the exhaustion requirement of 28 U. S. C. § 2254 (1958 ed.) would clearly promote state primacy in the implementation of these guarantees. Of greater importance, it would assure not only that meritorious claims would generally be vindicated without any need for federal court intervention, but that nonmeritorious claims would be fully ventilated, making easier the task of the federal judge if the state prisoner pursued his cause further. See *Townsend* v. *Sain*, 372 U. S. 293, 312–318. Greater finality would inevitably attach to state court determinations of federal constitutional questions, because further evidentiary hearings on federal habeas corpus would, if the conditions of *Townsend* v. *Sain* were met, prove unnecessary.

None can view with satisfaction the channeling of a large part of state criminal business to federal trial courts. If adequate state procedures, presently all too scarce,[8]

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ment of the criminal law. When the States do fully meet this responsibility, we will all be better off, and we will more nearly have realized the potentialities of our Great Federal form of Government."

[8] The Uniform Post-Conviction Procedure Act, 9B Uniform Laws Ann. 352–359, designed to provide adjudication of federal claims, has had but slight influence in the States. Arkansas adopted the Uniform Act in 1957, but repealed it two years later. 2 Acts of Arkansas (1959) 1161. Five States have adopted their own statutes. Ill. Rev. Stat., c. 38, §§ 122–1 to 122–7 (1963); Me. Rev. Stat. Ann., c. 126, §§ 1–A to 1–G; Md. Ann. Code, Art. 27, §§ 645A to 645J (Supp. 1964); N. C. Gen. Stat. §§ 15–217 to 15–222 (Supp. 1963); Ore. Rev. Stat. §§ 138.510–138.680 (1963). Procedures have been adopted by rule of court in four States. Alaska Crim. Rule 35 (b); Del. Superior Court Rules of Crim. Proc., Rule 35 (a); Mo. Rules of the Supreme Court, Rule 27.26; N. J. Crim. Practice of Superior and County Courts, Rule 3:10A–2. Some state courts are apparently broadening existing postconviction remedies by judicial construction. See, *e. g.*, *Rice* v. *Davis*, 366 S. W. 2d 153 (Ky. 1963); *People* v. *Huntley*, 15 N. Y. 2d 72, 204 N. E. 2d 179 (1965); *State ex rel. Banach* v. *Boles*, 131 S. E. 2d 722, 728 (W. Va. 1963); *Hunt* v. *Warden*, 335 F. 2d 936, 941–942 (C. A. 4th Cir.) (discussing the

were generally adopted, much would be done to remove the irritant of participation by the federal district courts in state criminal procedure. The 1954 Report of the Special Committee on Habeas Corpus of the Conference of Chief Justices pointed the way in urging that "State statutes should provide a postconviction process at least as broad in scope as existing Federal statutes under which claims of violation of constitutional right asserted by State prisoners are determined in Federal courts under the Federal habeas corpus statutes," and recommending provisions for hearing, a record, fact findings and conclusions of law. H. R. Rep. No. 1293, 85th Cong., 2d Sess., p. 7 *et seq.*

These are similar to other suggestions of desirable attributes of a state postconviction procedure which should reduce the necessity for exercise of federal habeas corpus jurisdiction.[9] The procedure should be swift and simple and easily invoked. It should be sufficiently comprehensive to embrace all federal constitutional claims. In light of *Fay* v. *Noia*, *supra*, it should eschew rigid and technical doctrines of forfeiture, waiver, or default. See *Douglas* v. *Alabama*, 380 U. S. 415, 422–423; *Henry* v.

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expanding Maryland remedy). See also the views expressed in *People* v. *Wilson*, 18 App. Div. 2d 424, 430, 239 N. Y. S. 2d 900, 906; *Ex parte Aaron*, 275 Ala. 377, 381–382, 155 So. 2d 334, 337–338 (dissenting opinion); *Donnell* v. *Nash*, 323 F. 2d 850 (C. A. 8th Cir.); *Cobb* v. *Balkcom*, 339 F. 2d 95, 100 (C. A. 5th Cir.). Proposals that the States make their postconviction procedures coextensive with federal habeas corpus are found in Meador, Accommodating State Criminal Procedure and Federal Postconviction Review, 50 A. B. A. J. 928 (1964); National Assn. of Atty. Gen., Conference Proceedings, 1964, pp. 42–43 (remarks of Arthur J. Sills, Atty. Gen. of New Jersey), 149–150 (resolution of the Association); Brennan, Some Aspects of Federalism, 39 N. Y. U. L. Rev. 945, 957–959 (1964).

[9] See Meador, *supra*, 50 A. B. A. J., at 929–930; Brennan, *supra*, 39 N. Y. U. L. Rev., at 958–959; cf. Report No. 23, ABA Section of Criminal Law, Mid-Winter Meeting, Feb. 1965, p. 7.

Mississippi, supra. It should provide for full fact hearings to resolve disputed factual issues, and for compilation of a record to enable federal courts to determine the sufficiency of those hearings. *Townsend* v. *Sain, supra.* It should provide for decisions supported by opinions, or fact findings and conclusions of law, which disclose the grounds of decision and the resolution of disputed facts. Provision for counsel to represent prisoners, as in § 4 of the Nebraska Act, would enhance the probability of effective presentation and a proper disposition of prisoners' claims.

But there is no occasion in this case to decide whether due process requires the States to provide corrective process. The new statute on its face is plainly an adequate corrective process. Every consideration of federalism supports our conclusion to afford the Nebraska courts the opportunity to say whether that process is available for the hearing and determination of petitioner's claim.